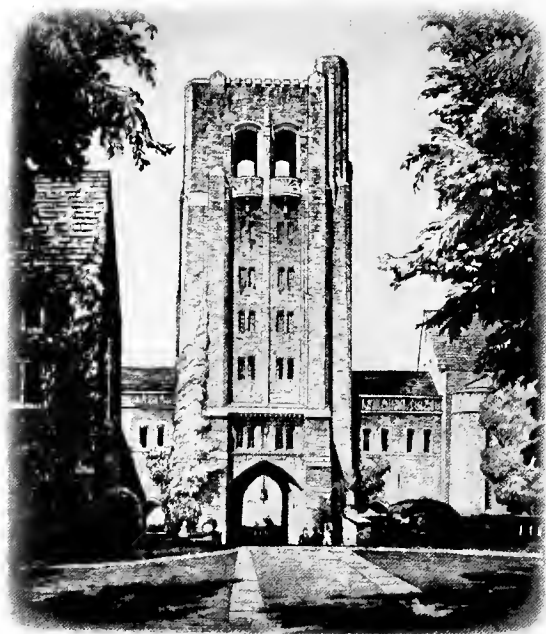




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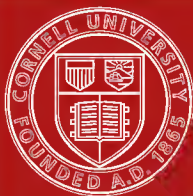
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PRINCIPLES  
OF THE  
LAW OF SUCCESSION  
TO  
DECEASED PERSONS

BY

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## PREFACE.

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THE present treatise is an attempt to solve, so far as regards elementary English law, the problem which has been thus concisely stated—"What becomes of the rights and obligations of a person when that person dies?" (*Markby's Elements of Law*, section 773.) My object has been to place before the student, in a connected and systematic form, the leading principles of English law on this important subject.

In dealing with rights and obligations in general, and pointing out those which are capable of passing by succession, I have availed myself, as far as possible, of the classifications of private rights and obligations contained in Professor Holland's work on Jurisprudence. By adopting them I have been enabled to state concisely, and, I hope, clearly and with some degree of completeness, the effect of a person's death upon his various legal relations. This result will, I trust, be considered sufficient justification for the introduction into an English law book of classifications and terms seldom met

with except in works on the general theory of law.

The remainder of the subject is necessarily more or less covered by chapters or passages in our standard elementary text books, and to these I am under great obligations, but especially am I indebted to our leading authority—*Williams on the Law of Executors and Administrators*. I have given very frequent references to these works, not only as an acknowledgment of the assistance they have rendered to me, but also with the object of indicating to the reader the sources whence he may derive further information upon the various topics under discussion.

I take this opportunity of expressing my gratitude to W. MARKBY, D.C.L., Reader in Indian Law in the University of Oxford, and Fellow of All Souls' College, and to E. A. WHITTUCK, M.A., Law Lecturer of Oriel and Lincoln Colleges, for many valuable suggestions which they have kindly made from time to time, and which have added much to whatever merits the Work might otherwise have possessed—for its imperfections I alone am responsible.

T. R. P.

10, NEW INN HALL STREET, OXFORD.  
*November, 1888.*

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Principles  
OF THE  
ENGLISH LAW OF SUCCESSION  
TO DECEASED PERSONS.

---

INTRODUCTION.

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WHEN a person dies some of his rights and obligations may be completely extinguished, *e.g.*, a life estate must be extinguished by the death of the tenant for life; others may survive but in a changed or modified form, *e.g.*, the *legal* right of a joint owner of property ceases at his death, but an *equitable* right to a share of the property often survives; the remainder may survive unchanged, *e.g.*, the right of the owner of an estate in fee simple. All the rights and obligations which survive will devolve upon some other person or persons, who will thus be placed, to a greater or less extent, in the legal position formerly occupied by the deceased and accordingly will be said to *succeed* him. What persons will be entitled to succeed, and the nature and extent of the rights and obligations to which they will succeed, are questions which must be determined by that branch of the law which we are about to consider, and it is proposed to deal with the subject in the following order:—

1. It would be difficult to explain some of the leading

principles of the law of succession without referring to their early history; and therefore, in order to prevent any long digression in the body of the work, it seems convenient at the outset to give a short historical sketch of the origin and development of the law on this subject.

2. We must next inquire what classes of rights and obligation of a deceased person are extinguished by his death, and thereby shall ascertain what rights and obligations are capable of passing by succession. The rights which pass by succession constitute what is called the *estate* of the deceased. The *estate* is divisible into *real* estate and *personal* estate, a division of the greatest importance and one of the most peculiar features of the English law of succession. This division of the estate (*i. e.*, of the rights) has led to what is, to a certain extent, a corresponding division of obligations.

These divisions of rights and obligations lie at the very root of much of the law of succession, and accordingly we must explain them as early as possible, *i. e.*, as soon as we have ascertained what rights and obligations are capable of passing by succession.

3. Having ascertained the rights and obligations which will pass by succession, and explained their divisions, we will then be in a position to consider more in detail the rules of law which determine the persons who are *entitled* to succeed, and the nature and extent of the rights and obligations to which they will succeed. The law of succession to deceased persons is divisible into two distinct branches according as the deceased has, or has not, made a *valid will*. Where he *has not* made a valid will, he is said to die *intestate*, and the succession is regulated by the *Law of Intestate Succession*; where he *has* made a valid will, he is said to die *testate*, and the succession is regulated by the *Law of Testamentary Succession*.

The following are the leading characteristics of each of these two kinds of succession.

When a person dies intestate (1) the person who happens to be his *heir-at-law* succeeds, from the moment of the death, to all the *real* estate and to certain of the obligations; and is entitled to the estate for his own benefit; (2) a person appointed by the Probate Division of the High Court of Justice succeeds, from the date of his appointment, to all the *personal* estate and to the remainder of the obligations; but he is not entitled to the estate for his own benefit, and, after discharging the obligations, he is bound to distribute the residue of the estate amongst the *next of kin* of the deceased.

When a person dies testate (1) the persons to whom he has given his *real* estate, and who are called the *devisees* (*a*), succeed, generally from the moment of the death, to the interests conferred on them; they also succeed to certain obligations; (2) the *executor* (*i. e.*, the person appointed by the will to carry out its directions) succeeds, from the moment of the death, to all the *personal* estate, and to the remaining obligations; his legal position is almost identical with that of the administrator; and after discharging the obligations he is bound to hand over the residue of the estate to the persons to whom interests in the personal estate have been given; such interests are called *legacies*, and the persons entitled to them *legatees*.

The persons who succeed to the *real* estate, whether by testate or intestate succession, *i. e.* the heir and the devisees, are, from that circumstance, called the *real representatives* of the deceased; while those who succeed to the *personal* estate, *i. e.* the administrator and executor, are, for a like reason, called the *personal representatives*.

(*a*) When real estate is disposed of by a will, it is said to be *devised*.

4. Lastly, we must describe a peculiar kind of transfer of rights which cannot properly be placed under either testamentary or intestate succession, and yet is closely connected with the subject of succession to deceased persons, namely, *donationes mortis causâ*.

The whole subject of the law of succession to deceased persons will therefore be divided as follows:—

PART I.—Historical Sketch of the Law of Succession to Deceased Persons.

II.—The Rights and Obligations which pass by Succession, and their divisions.

III.—The Law of Intestate Succession.

IV.—The Law of Testamentary Succession.

V.—*Donationes Mortis Causâ*.

## PART I.

HISTORICAL SKETCH OF THE LAW OF SUCCESSION  
TO DECEASED PERSONS.

VERY little reliable information respecting the early law of testamentary and intestate succession is furnished by the records of the Anglo-Saxon period. There seems no doubt, however, that the law of intestate succession derived its origin from pure Teutonic customary law, imported by the various German tribes who invaded and settled in Britain after its evacuation by the Romans in the fifth century. "The Angles, Jutes, and Saxons, who, according to Bede, furnished the mass of immigrants in the fifth century, were amongst those tribes of Lower Germany who had been the least affected by Roman influences" (a); and the absence of any vestige of Roman law in the evidence of Anglo-Saxon customary law which has been handed down to us, points conclusively to the fact that the customary law of our Teutonic ancestors was not, to any appreciable extent, affected by any remnant of Roman legal institutions which may have survived the departure of the Romans (b).

The passage in the *Germania*—"Hæredes autem successoresque sui cuique liberi, et nullum testamentum; si liberi non sunt, proximus gradus in possessione, fratres, patru, avunculi" (c)—proves that testamentary succession was unknown amongst

(a) Stubbs, *Select Charters*, p. 1; 3rd ed.; Stubbs, *Const. Hist.*  
*Const. Hist.* vol. i. pp. 40, 41. vol. i. p. 62.

(b) Digby's *Real Prop.* p. 1, (c) *Cap.* 20.

the Teutonic tribes at the time Tacitus wrote. We have no further information on the subject until about the ninth century, and we then find testamentary succession an established institution. What produced this change?

Testamentary succession is perfectly incompatible with what we know of the proprietary rights of primitive society. Property held in common by a family, or larger group bound together by real or imaginary ties of blood relationship, is the rule; individual ownership, or ownership in severalty, is the exception. Each individual member of the group had merely a right of enjoyment over the common property during his life, and it is obvious that he could not be permitted to defeat the rights of the other members by disposing of this right by will. When, at a later period, absolute ownership in severalty became the rule, instead of the exception, the old idea as to the community of rights over property still survived in the customary rights of the children, or, failing children, of the more distant relations of the owner in severalty, to succeed to the property at his death (*d*). It appears, therefore, that individual ownership, and also the right to defeat the customary right of children and other relations, are conditions precedent to the establishment of testamentary succession.

“Without conjecturing how the change took place, we may safely assume that, although traces still remain of common land tenure at the opening of Anglo-Saxon history, absolute ownership of land in severalty was established and becoming the rule” (*e*). Moveables had probably become the subject of separate ownership long before, their changeable and perishable nature rendering them inconvenient objects of common ownership. But although separate property

(*d*) Cf. Maine, *Ancient Law*, pp. 197 *et seq.*

(*e*) Stubbs, *Const. Hist.* vol. i. p. 75.



appears to have thus early become an established institution amongst the Anglo-Saxons, there are indications that the customary rights of the relations to succeed to a dead man's property were still vigorously asserted, and it was only after a long conflict that the right to defeat them became generally recognised, subject, at any rate as to personal property, to certain limitations in favour of the family of the deceased. The precise date when this conflict commenced and ended cannot be ascertained, but it is generally agreed that wills were originally introduced into Britain by the Romish clergy, after the inhabitants had been converted to Christianity. A will would enable a man to leave part of his property to the Church after his death; and as such gifts were held by the clergy to confer benefit upon the soul of the donor, the interest of the Church and the religious belief of the age would both lend their powerful influence in support of testamentary succession, and this, no doubt, is one of the chief reasons of its ultimate triumph. We will first state shortly the principles of intestate succession in early Anglo-Saxon law, so far as they can be ascertained, and then attempt to show how far they were altered by the creation of new customs and broken in upon by testamentary succession, during the later portion of the Anglo-Saxon period of our history.

As we have no record of Anglo-Saxon law before the ninth century, we must try to trace it out in the customary law of the Teutonic tribes to whom the Anglo-Saxon race owes its origin. There is much conflict of opinion, amongst the leading authorities upon the subject, respecting the manner and order in which the more distant grades of relations were entitled to succeed (*f*), but they seem to be

(*f*) The controversy is summarized in "Essays in Anglo-Saxon Law," p. 130.

generally agreed that amongst near relations the following order of succession was observed :—

First sons, secondly daughters, thirdly grandchildren, and so on in case there were other descendants. But it seems that grandchildren whose parent (whether a son or daughter) died before their grandfather, were not entitled to a share in the property if any of the brothers or sisters of their parent were living.

On failure of descendants, first the father, secondly the mother, thirdly the brothers, and fourthly the sisters of the deceased person were successively entitled (*g*).

It appears that the persons who formed each of these classes of relations shared equally without distinction of age, and there is no trace in early Anglo-Saxon law of any difference between succession to moveable and immoveable property.

How far could these customary rights be broken in upon by will? Let us take the case of succession firstly to land, and secondly to moveable property.

Land in the ninth century was divisible into two chief classes—(1) public land, or as it was called *folc-land*; and (2) land held by private persons.

Folc-land might be granted to private persons by charter, or *book* as it was also called, and it then lost its character of public land; but such grants could only be made by the king with the consent of the witenagemot until, at a later period, the king had acquired the sole right of dealing with the folc-land. Land so granted was called *boc-land*—book-land (*h*). Folc-land might also be granted to private persons to hold for a certain time subject to the payment of a rent or performance of services, and in this case it did not lose its character of public land, and it seems that the right of enjoy-

(*g*) Essays in Anglo-Saxon Law, p. 132.

(*h*) Digby's Real Prop. p. 12, 3rd ed.

ment over it could not be alienated either *inter vivos* or by will without the consent of the community or its chief (*i*).

Land held by private persons was divisible into two classes—(1) land held in severalty; (2) land held in common. The latter, of course, could not be disposed of by will.

Land held in severalty was divisible into—(1) *Alodial* land, *i. e.*, land held in absolute ownership; (2) *Læn-land*, *i. e.*, land let out by the owner to another person on such terms as might be agreed on between them. If let for a term exceeding the life of the person to whom it was let, it might be the subject of testamentary or intestate succession.

Alodial land was divisible into—(1) heir-land (*k*) or family land; and (2) book-land.

Heir-land seems to have included inherited land as well as land acquired otherwise than by inheritance, except book-land.

Book-land was so called because the grant was evidenced by a book or charter. "It is generally expressed in the charter that the grantee may grant the land away to whomsoever he pleases in his life-time, or leave it by his last will, and, if not so disposed of, it is to descend to his representatives. These powers, however, seem to have depended upon the form of the gift as expressed in the charter: the power of alienation might have been restricted so that the land could not be granted away from the kindred, or the descent of the land might be confined to lineal descendants, or to heirs male or female. In these respects it was a principle of Anglo-Saxon customary law that the nature and extent of the rights of the grantee depended upon the form of the gift" (*l*). Folc-land, as we have seen, might be converted into book-land, and it then became private property. Heir-land was

(*i*) Digby's Real Prop. p. 16, p. 197, 2nd ed.  
3rd ed.

(*l*) Digby's Real Prop. p. 14,

(*k*) The Land Laws, Pollock, 3rd ed.

also frequently the subject of a grant by book, and then became book-land; but such grants seem to have been at first stoutly resisted by the grantor's near relatives, and there is some evidence that originally they were not valid unless made with the consent of, or confirmed by, the relations. It is probable, too, that a man never acquired the power to grant away the *whole* of the family land (*m*). Book-land seems always to have been alienable by will, except so far as it was forbidden by the terms of the grant (*n*), though it seems probable that if a man had no heir-land to leave to his relations he could not dispose of *all* his book-land, so as to disinherit them entirely (*o*). And, as it is sometimes translated "*terra testamentalis*" as opposed to "*terra hæreditaria*" or heir-land, it seems that the right to dispose of it by will was established before wills of heir-land were recognised as binding dispositions of property.

There is some evidence that wills of heir-land were originally mere re-settlements of the property amongst the relations of the testator (*p*), and that when made in favour of strangers the relations successfully resisted them. In course of time, however, their validity seems to have become established, though it is probable that, as in the case of book-land, a testator could not entirely disinherit his near relations (*q*). Mr. Digby mentions "the characteristic which prevailed before the Conquest of entire freedom of alienation, both *inter vivos* and by will, at all events of boc-land, *except so far as this right is limited by the claims of the family*" (*r*).

It seems, then, that during the Anglo-Saxon period freedom

(*m*) Glanville, Lib. 7, c. 1, quoted in Digby's Real Prop. p. 87, 3rd ed.

(*n*) Cf. Laws of Alfred, c. 41, quoted in Stubbs, Select Charters, p. 62.

(*o*) Glanville, *supra*.

(*p*) Cod. Dip. CCCXVII, CCCXCII, MCCXLII.

(*q*) Glanville, *supra*.

(*r*) Real Prop. p. 28, 3rd ed.

of testamentary disposition over land had been established, except so far as it was limited (1) by the terms of the grant to the testator, and (2) by the claims of his family, though what *proportion* of his property a man was bound to leave to his family is unknown. No alteration seems to have been made during the Anglo-Saxon period in the rules (above stated) of intestate succession, so far as they related to land.

Our information respecting testamentary succession to moveables is exceedingly meagre, but it seems that if a man had a wife and children he could only dispose by will of *one-third* of his moveables; at his death his widow took one of the remaining thirds, his children the other; if he had children but no wife, or a wife and no children, he could dispose by will of *half* his moveables, and the widow or children took the other half; in case he had neither wife nor children, he could dispose of the whole (*s*).

A most important alteration was effected in the rules of intestate succession to moveables. (1) It seems that the old Teutonic custom that males should be preferred to females had been broken through, and that females took an equal share with males in the moveables of the deceased. (2) After payment of debts, the moveables of the deceased were divided into three parts, if he left a widow and children; into two, if he left a widow and no children, or children and no widow; the widow or children taking a third or half, as the case might be, and the remaining third or half being disposed of by the clergy *in pios usus* (*t*).

These shares of the widow and children came to be known as their *pars rationabilis* of the effects of the deceased, and were for a long period recognised as their common law right.

(*s*) 2 Bl. Com. 491, quoting Glanville, Lib. 2, c. 5.

(*t*) Kentish customs quoted in Lambard's *Perambulations* of

Kent, p. 518; Robinson's *Common Law of Kent*, p. 285; Bede's *Ecc. Hist.* Lib. 5, c. 12.

The equal division of moveable property amongst both males and females has remained the established rule to the present time, with the exception of certain classes of moveables to be presently mentioned (*u*), which being in some manner attached to or connected with land are subject to the same rules of succession as land.

We have hitherto spoken of the relatives of a deceased person *succeeding* to his personal as well as to his real property, for during the Anglo-Saxon period we have no indication that any successor was known who corresponded to the administrator of modern times. Any conjecture upon the subject is involved in the consideration of a most important event in the history of testamentary and intestate succession to personal property with which we must now deal. The Church acquired the right to take possession of, and to administer, the moveable property of intestates, and also jurisdiction in matters relating to wills. How and when were these rights acquired? We have no direct evidence, but probably the explanation given in *Hensloe's Case* (*x*) furnishes the most correct answer to the first part of the question. It is there said, that when of ancient times a man died intestate, and had made no disposition of his goods, nor committed his trust to anyone, the king (who is *parens patriæ*, and has the supreme care of providing for all his subjects, that each may enjoy that which he ought to have) was accustomed to seize by the hands of his officers the goods of the intestate, to the intent that they might be preserved and disposed of for the burial of the dead, payment of debts, advancement of the wife and issue, or, failing issue, of other relatives. The words "no disposition of his goods," &c., would seem to refer to a custom similar to the *donationes mortis causâ* of modern times (*y*), that is the distribution of property by a man on

(*u*) *Post*, p. 61.

(*x*) 9 Rep. 38.

(*y*) See *post*, Pt. V.

his death-bed; and in this case the intervention of the king's officers would be unnecessary. These officers were probably the officers of the county court of the sheriff, where matters of all kinds used to be determined (z); in this court the bishop sat to declare the spiritual law (a), so that, if the property of intestates were administered in the county court, it would come under the special cognizance of the bishop, who would be the most fit person to declare in what way "the third" of the goods ought to be disposed of for the benefit of the soul of the deceased (b). If this view be correct, it is easy to imagine that in course of time the bishop would acquire the sole jurisdiction over the administration of intestate estates; and when this jurisdiction had been established a jurisdiction in the matter of wills, "also, of course followed; for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate whose right of distributing his chattels for the good of his soul was effectually superseded thereby" (c). At any rate this view seems consistent with the authorities quoted and relied upon in *Hensloe's Case* (d), which decide, that the jurisdiction of the Church in respect of probate of wills, and administrations of intestate moveable property, was a *custom*, and not a *common law right*, and that their authority in such matters was derived from the Crown.

In theory no doubt the ordinary (e) had merely the right of administering the goods, and was bound to pay the debts of the deceased, and the *partes rationabiles* of the widow and

(z) 2 Bl. Com. p. 494.

(a) Stubbs, Const. Hist. vol. i. p. 114.

(b) Perkins, s. 486.

(c) 2 Bl. Com. p. 494.

(d) 9 Rep. 38.

(e) A name taken from the canonists and applied to a bishop,

or other person with "ordinary jurisdiction" in matters ecclesiastical. Steph. Com. vol. ii. p. 184, 9th ed. He is so called "*quia habet ordinarium jurisdictionem, in jure proprio et non per deputationem.*" Co. Litt. 96 a.

children, and to dispose of the residue *in pios usus*; in practice, however, he seems to have acquired absolute and uncontrolled power over the property. This was probably due to the fact that he alone was supposed to be competent to decide to what extent it was necessary to dispose of the goods *in pios usus* for the benefit of the soul of the deceased, and to what *pios usus* they ought to be applied, and accordingly was regarded as accountable to no one but to God and his own conscience for the manner in which he administered the goods (*e*). If he disposed *in pios usus* of so much of the goods that creditors remained unpaid, and the widow and children were unprovided for, it seems that these persons had no remedy whatever against him (*f*), although, as regards creditors at any rate, it seems certain that they always had, at common law, a right to be paid before the goods were disposed of *in pios usus* (*g*).

The jurisdiction of the ordinary only extended to the *goods* of the intestate which he could seize into his possession, and he could neither sue for debts due to the intestate, nor be sued for debts due from him (*h*).

The ordinary accordingly succeeded to the rights of the deceased over goods of which possession could be taken without having recourse to an action; the relations did not succeed to any right of the deceased over such goods; they merely had a right, at common law, to obtain a share of such goods, but had no means of enforcing their right as against the ordinary.

In case a person died testate, the validity of the will had to be proved to the satisfaction of the ordinary, and it seems that the executor was accountable to him for the manner in which the estate was administered. The executor succeeded, not only to the *choses in possession* (*i*), but also to the

(*e*) 2 Bl. Com. p. 495.

(*f*) *Dyke v. Walford*, 5 Moo. P. C. 434, 491, 492.

(*g*) *Snelling's Case*, 5 Co. 83 b.

(*h*) *Dyke v. Walford*, 5 Moo.

P. C. 434, 491; Coke, 2 Inst. c. 20.

(*i*) *I.e.*, any moveable property in the actual or constructive possession of a person; see 2 Steph. Com. p. 10, 10th ed.



*choses in action* (*j*) of the deceased, and was liable for the payment of his debts, so far as the estate would extend to meet them (*k*). If no executor were appointed by the will, it is doubtful whether the ordinary was bound to carry out the intentions of the testator, or whether he could administer the estate as if the testator had died intestate; but the opinion, formerly prevalent among lawyers, that the appointment of an executor was *essential* to the validity of a will (*l*), probably represents the early law upon this point.

At what date this jurisdiction of the Church was acquired is uncertain. The authorities prove that the jurisdiction was held to be an old-established institution in the thirteenth century (*m*); and although there is no direct evidence to show whether it arose before or after the Conquest, yet the great power and influence of the Anglo-Saxon Church in temporal matters seem to favour the presumption that it was established during the Anglo-Saxon period.

We have attempted to draw an outline of the law of testamentary and intestate succession during the Anglo-Saxon period, and we have seen that during the latter portion of that period a marked distinction had arisen between the rules which governed succession to land and moveable property respectively. That distinction became still more marked after the Norman Conquest and establishment of feudalism in England. No change which would affect the Anglo-Saxon law of property seems to have been brought about by direct legislation during the reigns of William I. and his immediate successors (*n*): it seems that their policy was rather to confirm, as far as possible, the laws and customs of the English. The changes which did take place were due to the

(*j*) *I.e.*, a mere right to recover moveable property by bringing an action. 2 Steph. Com. p. 11.

(*k*) Coke, 2 Inst. c. 19.

(*l*) Wentworth, Exors. pp. 3, 4, 4th ed.; 2 Bl. Com. 503.

(*m*) 3 Bl. Com. p. 96.

(*n*) Stubbs, Const. Hist. vol. i. p. 267.

introduction of the feudal customs and ideas of the Normans, and their gradual combination with Anglo-Saxon customs and ideas (*o*). These feudal customs and ideas almost exclusively related to the *holding of land*, and thus a complete revolution in the Anglo-Saxon law of land was gradually effected, while the Anglo-Saxon law of moveable property remained practically unaltered by the establishment of feudalism in England. For this reason the history of the law of succession to land after the Conquest is quite different from that of the law of succession to moveable property, and we will therefore deal with each separately. At present we will speak only of land and moveable property; probably from an early period some few kinds of moveable property passed by succession in the same manner as land, while some interests in land passed in the same manner as moveable property, but these exceptions can be more conveniently dealt with when we come to consider the modern division of the estate into *real* and *personal* estate.

We will now attempt to trace the history of the law of succession after the Norman conquest, and we will deal first with moveable property, and afterwards with land.

### I. *The Succession to Moveable Property.*

(1) *Intestate Succession.*—We have seen that at some early period the Church had acquired the sole jurisdiction in all matters relating to testamentary and intestate succession to personal property. We have seen, also, that the ordinaries had acquired what was practically an absolute and uncontrolled power of disposing of the *choses in possession* of intestates. As might be expected, this extraordinary power was often abused. One old authority complains “*quod ordinarii hujus modi bona nomine ecclesiæ occupantes, nullam vel saltem*

(*o*) Digby's Real Prop. p. 37, 3rd ed.

*indebitam faciunt distributionem*" (p). It appears, too, that it was usual to dispose of a certain proportion of the goods *in pios usus* before the debts were discharged, and in the thirteenth century this proportion was fixed by canon law at one-third of the whole of the goods (q); so that if the debts amounted to more than one-third they must either have remained unpaid to that extent, or the sum necessary to discharge them must have been deducted from the *partes rationabiles* of the widow and children.

The first attempt to check this abuse was made by the Statute of Westminster II. (r), which provided as follows:—

"The ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend in such sort as the executor of the same party should have been bound if he had made a testament."

This statute was in affirmance of the common law, which, as we have seen, made the debts of the deceased a first charge upon his estate (s).

The residue of the property, after payment of debts, remained in the hands of the ordinaries, so that the relations of the deceased were still at their mercy, until, in the following century, a statute (t) was passed which put an end to the power of the ordinaries to administer intestate estates. This statute provided as follows:—

"In case where a man dieth intestate the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods; which deputies shall have an action to demand and recover as executors the debts due to the said person intestate, in the King's Court, for to administer and dispend for the soul of the dead; and shall

(p) Fleta, Lib. 2, c. 57, s. 10.

(q) 2 Bl. Com. p. 495.

(r) 13 Edw. I. c. 19; A.D. 1285.

(s) See *supra*, p. 14.

(t) 31 Edw. III. stat. 1, c. 11.

answer also in the King's Court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer" (u).

The "next and most lawful friends" were interpreted to be the next of blood to the deceased who were under no legal disability (x).

The person deputed to administer the estate was afterwards known as the "*administrator*," and his appointment was called the "*granting of letters of administration*."

A subsequent statute (y) provided that administration might be granted to the widow or next of kin of the deceased, or to both: and that when several who were in the same degree of kindred claimed administration, the ordinary might elect one or more at his discretion.

The effect of the stat. 31 Edw. III. c. 11, was as follows:—On the death of a person intestate his rights over the goods in his possession vested in the ordinary, but his *choses in action* and obligations were in suspense. When the ordinary granted administration, the grant passed all his rights to the administrator, who, subject to the payment of debts, &c., thus obtained the same absolute right over the property as the ordinary formerly possessed. In addition to this, all *choses in action* of the deceased vested in him by the express provision in the statute, and he thus became the universal successor of the deceased, just as an executor became the universal successor of his testator. The statute, however, made no provision for the distribution of the residue of the estate after payment of debts, &c., and great doubts existed as to whether the administrator was bound to distribute it amongst the next of kin, in case he was not the sole next of kin. The point was finally decided in the case of *Hughes v. Hughes* (z),

(u) 31 Edw. III. stat. 1, c. 11;  
A.D. 1357.

(x) *Hensloe's case*, 9 Rep. 39.

(y) 21 Hen. VIII. c. 5, s. 3.

(z) Cart. 125; the decision of  
the Court is reported in 1 Lev.  
233.

the Court being of opinion that the administrator, like the ordinary, acquired uncontrolled power over the residue of the property and was not bound to distribute it, and that a bond taken by the ordinary to compel him to do so was void. Shortly after this decision the first *Statute of Distribution* (a) was passed, whereby the distribution of the estates of intestates was regulated in favour of the next of kin. This statute forms the basis of the order of distribution at the present day, and will therefore be fully considered in a subsequent part of this treatise (b).

The Ecclesiastical Courts retained their jurisdiction in granting probate and administration until 1857. In that year the Court of Probate Act (c) was passed, whereby this jurisdiction of the Ecclesiastical Courts was transferred to a special secular tribunal created by that Act, called the Court of Probate. Finally, by the Judicature Act of 1873 (d), the jurisdiction of the Court of Probate was assigned to the Probate, Divorce, and Admiralty Division of the High Court of Justice, whence all grants of administration must now be obtained.

(2) *Testamentary Succession*.—Little alteration took place after the Conquest with respect to testamentary succession. The widow and children were entitled to their third or half, as the case might be; this was now called their *pars rationalis*, and to recover it an action *de rationabili parte* would lie. This limitation upon the free power of testamentary disposition was recognised as a general rule of the common law in the reign of Henry II. (e), and seems to have continued to be so regarded until as late as the reign of Charles I. (f); although, in Sir Edward Coke's opinion, it was nothing but a

(a) 22 & 23 Car. II. c. 10.

(b) *Post*, p. 108.

(c) 20 & 21 Vict. c. 77; amended  
by 21 & 22 Vict. c. 95.

(d) 36 & 37 Vict. c. 66, ss. 3, 34.

(e) Glanville, Lib. 7, c. 5.

(f) Finch, 175.

local custom (*g*). After that period the limitation disappears, "though we cannot trace out when the alteration began" (*h*).

The testator was also bound to give his best and principal chattel to his lord, and to bequeath something to the church (*i*). The former, under the name of heriot, could probably have been claimed by the lord in Anglo-Saxon times (*j*), and in some manors the custom still exists (*k*). Bequests to the church have long since ceased to be obligatory.

## II. *The Succession to Land.*

(1) *Intestate Succession*.—Tenure seems to have been gradually established in England by the introduction, after the Conquest, of "Norman customs and ideas, and their combination with Anglo-Saxon customs and ideas" (*l*). The result was that the king came to be regarded as the only *absolute* owner of land; all other persons were deemed to have merely "estates" in it. These estates were said to be "held" either of the king or of some intermediate lord, who in his turn held of the king. The person of whom the land was held was called the *lord*; the person holding, the *tenant*. The estate might be merely an estate for the life of the tenant, and in this case, on the death of the tenant, the land would revert to the lord; or the estate might be one which would descend to the heirs of the tenant, and the land would not then revert to the lord until there was a failure of the heirs of the tenant. "Feudal donations were not extended beyond the precise terms of the gift by any presumed intent, but were taken strictly" (*m*): so a grant "to A. B." was a grant

(*g*) 2 Inst. 33.

(*h*) 2 Bl. Com. 492.

(*i*) Glanville, Lib. 7, c. 5.

(*j*) Canute, c. 71, 72; Stubbs,

Select Charters, p. 74.

(*k*) See Wms. Real Prop. p. 420,  
16th ed.

(*l*) Digby's Real Prop. p. 37,  
3rd ed.

(*m*) Wms. Real Prop. p. 22,  
16th ed.

to A. B. personally, and he could only hold it for his life ; if, therefore, it were intended that the heirs of the tenant should succeed to the land, it was necessary to expressly mention them in the grant. The common form of expressing such intention was, "to A. B. *and his heirs*." By the term "*heirs*" it seems that the issue of the tenant were at first only meant—collateral relations, such as brothers and cousins, being excluded ; the true feudal reason of this construction is stated by Blackstone to be, that what was given to a man for his personal service and personal merit ought not to descend to any but the heirs of his person (*n*). Perhaps this construction may have been applied to grants made to new tenants subsequently to the establishment of tenure, but it seems extremely doubtful whether it would apply to cases where the old allodial proprietors became tenants of a lord by the process called commendation (*i. e.*, surrender of the land to the lord and re-grant by him to the tenant) (*o*). The point is not, however, of much importance, for by the reign of Henry II. "*heirs*" included collaterals in all cases, unless a contrary intention were expressed in the grant. It seems, too, that at first a grant to "A. B. and his heirs" was construed as if it had constituted separate grants to A. B. *and* to his heirs, so that after the death of A. B. his heirs would take the land, not as *successors* to A. B., but as *direct grantees* of the grantor. This construction, however, appears to have soon given way to that which has ever since been recognized by the Courts, namely, that such grants vest a fee simple estate (the largest freehold estate) in the grantee, and that the heir takes by descent from the grantee, and not from the grantor. In other words, the term "*heirs*" is not a word of "*limitation*" (*i. e.*, used to indicate the estate which the heirs are to take), but of "*purchase*" (*i. e.*, it indicates the kind of

(*n*) 2 Bl. Com. p. 221.

(*o*) See Digby's Real Prop. pp. 31, 34, 3rd ed.

estate which the grantee is to take, namely, that it is an estate of *inheritance* as opposed to merely a life estate).

The grant specified the kind of service which the tenant was required to render to the lord, and the different kinds of service which thus became due from different tenants led eventually to the division of tenures into the following chief classes (*p*):—

1. *Frankalmoign*—the tenure by which religious houses held land; they were only bound to render spiritual service.

2. *Grand serjeanty*.—"Where a man held his lands of the king by services to be done in his own proper person to the king, as to carry the banner of the king, or his lance, or to be his marshal, or to carry his sword before him at his coronation, or to do other like service" (*q*).

3. *Knight service*.—Where the tenant was bound to perform military service; he was also bound to do homage, and give reliefs and aids, &c.; but military service was the distinctive mark of this kind of tenure.

4. *Socage*.—"Tenure in socage is where the tenant holdeth of his lord the tenancy by certain services for all manner of services, so that the service be not knight's service. As where a man holdeth his land of his lord by fealty and certain rent for all manner of services; or else where a man holdeth his land by homage, fealty, and certain rent for all manner of services; or where a man holdeth his land by homage and fealty for all manner of services: for homage by itself maketh not knight's service" (*r*).

5. *Petit serjeanty*.—This was merely a species of socage tenure; the service consisted in rendering to the king

(*p*) Probably the distinctions between the various kinds of tenure were not accurately ascertained until the reign of Henry II. See Digby's Real Prop. p. 38, n.,

3rd ed.

(*q*) Litt. Tenures, s. 153.

(*r*) *Ibid.* s. 117; Digby's Real Prop. p. 46, 3rd ed.



annually some small thing belonging to war, *e. g.* "a bow or a sword or a dagger or a knife, or a pair of gilt spurs or an arrow or divers arrows." Thus it only occurred where lands were held of the king (*s*).

Tenants holding by any of these tenures "were regarded as free holders, having an estate or interest in lands worthy of a freeman and involving no service derogatory to the status of freedom" (*t*). Before the reign of Henry II. land held by these tenures was called *liberum tenementum* (*t*), and later freehold land.

In tracing the history of intestate succession to freehold land we are only concerned with tenure by knight service and socage tenure. Ecclesiastical like other corporations do not die, and the succession of one ecclesiastic to another does not therefore belong to the branch of the law of succession which is the subject of the present treatise. Where land was held by grand serjeanty the rules of intestate succession seem to have been the same as those which relate to tenure by knight service; while petit serjeanty is merely a species of socage tenure.

In the reign of Henry II. an important distinction had arisen between the rules of intestate succession to land held by knight service, and that held by socage tenure. The effect of these rules was as follows (*u*) :—

(1) Tenure by knight service.

If there were two or more males in the nearest degree of kindred to the deceased tenant, the rule of *primogeniture* always prevailed, *i. e.*, the eldest succeeded to the whole of the estate.

(*s*) Litt. Tenures, s. 159;      (*u*) See Glanville, Lib. 7, cc. 3  
Digby's Real Prop. p. 48, 3rd ed.      and 4; quoted in Digby's Real

(*t*) Digby's Real Prop. p. 48,      Prop. p. 84, 3rd ed.  
3rd ed.

But if there were only females in the nearest degree, the rule of primogeniture did not apply, and all succeeded together; except that the eldest alone was entitled to the mansion house (*capitale messuagium*), provided she made satisfaction to the others for its value.

(2) Socage tenure.

- (i) "*Antiquitus divisum*," i. e., divisible according to the old rules.

All males in the nearest degree of kindred to the deceased *shared equally*, except that the eldest was entitled to the mansion house, provided he made satisfaction to the others for its value.

Failing males, all females in the nearest degree shared equally, but the eldest had the same privilege as the eldest male respecting the mansion house.

- (ii) *Non antiquitus divisum*.

Sometimes the rule of primogeniture was the custom, sometimes the youngest son or other descendant was entitled to the whole inheritance, if there were males in the nearest grade of relationship.

Failing males, females in the nearest degree succeeded in the same manner as in the case of *antiquitus divisum*.

(3) Rules applicable to both species of tenure.

- (i) Males were always preferred to females in the same degree of relationship, *e. g.*, if a man died leaving one son and several daughters, the son would take the whole inheritance.

Exception: a special custom of long standing in a particular city might enable females to share the inheritance with males.

- (ii) The son of a second wife was preferred to the daughters of a first wife, but daughters of a first and second wife shared equally.

(iii) The order in which different grades of relations were entitled to succeed was:—

- a. Sons and their descendants.
- b. Daughters and their descendants.
- c. Brothers and their descendants.
- d. Sisters and their descendants.
- e. Uncles (paternal and maternal) and their descendants.
- f. Aunts (paternal and maternal), and their descendants.

It was still a moot point in Glanville's time, whether, if a man died leaving a younger son and a grandson by a deceased elder son, the younger son or grandson should succeed. It was subsequently settled in favour of the grandson.

Thus, in the reign of Henry II., the leading principle of the feudal law of succession—the rule of primogeniture (*x*)—had entirely superseded the Anglo-Saxon custom of equal division in respect of land held by military tenure, and was fast encroaching upon the same custom in respect of land held by socage tenure.

The feudal principle that an inheritance never *ascended* (*y*) had also been established, and consequently the *lineal ancestors* of a deceased person were excluded from succession to his land. The reason for this change cannot be satisfactorily explained, but the theory which seems to be most generally received is, that at the time when grants of land were construed as passing the land only to the *descendants* of the grantee, and not to his collateral relations (*z*), a custom was introduced of expressly providing in the grant, that the land should descend in the same manner as if it had been an ancient inheritance which had *descended* upon the grantee.

(*x*) For the origin of primogeniture, see Maine's *Ancient Law*, pp. 227 *et seq.*

(*y*) "*Hæreditas nunquam ascendit*," Glanville, Lib. 7, c. 1.

(*z*) See *supra*, p. 21.

This was called a grant of a *feudum novum*, or new estate of inheritance, to be held *ut feudum antiquum*, i. e., as an ancient estate of inheritance—one which had descended from some remote common ancestor. Consequently, collateral relations of the grantee were entitled to succeed in case he died without descendants. But on the other hand lineal ascendants were excluded; for, according to this fiction, they must have been the owners of the estate before it *could* descend upon the grantee. The weak point in this theory is, that it would, if consistently worked out, exclude an elder brother of the grantee, or an uncle who was an elder brother of the grantee's father; for the elder brother would be entitled to the land before the grantee, and the uncle before the grantee's father, whereas, on failure of other nearer relations, these persons were always held entitled to succeed to the land of a younger brother, or a nephew by a younger brother respectively (a).

In the reign of Henry III. the following changes had taken place:—

(1.) The distinction between socage tenures "*antiquitus divisum*" and "*non antiquitus divisum*" had disappeared, and the rule of primogeniture applied to all socage tenures indiscriminately, except in some particular localities, where by custom a different rule prevailed, *e. g.*, the Kentish custom of gavelkind tenure, whereby all the sons, or other class of male relatives, succeeded in equal shares; customs attached to burgage tenure (*i. e.*, socage tenure of land in towns), as that of "borough-English," whereby the youngest son was entitled to succeed in exclusion of the elder sons.

(2.) The question whether a man's younger son or his grandson by a deceased elder son should succeed to his land, had been decided in favour of the grandson; esta-

(a) Wms. Real Prop. p. 126, 16th ed.

blishing the rule that the issue represents the ancestor *in infinitum*.

(3.) Where a person *purchased* land and died without descendants, leaving a sister of the whole blood and a brother of the half-blood, the sister was entitled to succeed in preference to the half-brother; but it seems to have been still undecided whether, if in the above case the person so dying had obtained the land by descent (*i. e.*, had inherited it from his father or other ancestor), the half-brother would not have been preferred to the sister; Bracton seems to have been in favour of the half-brother (*b*). The point was ultimately decided adversely to the half-blood.

(4.) Where the deceased person had no descendants, all relations on his father's side, however remote, were preferred to the nearest relations on his mother's side; and so until the father's relations were exhausted, the mother's relations were not entitled to succeed to the property (*c*).

Before the close of the next reign (Edward I.) the rules of intestate succession seem to have been finally settled (*d*), and continued unaltered until the Act "for the amendment of the law of inheritance" was passed in 1833 (*e*). They have been summarized (*f*) as follows:—

1. "Inheritances shall lineally descend to the issue of the person last seised *in infinitum*; but shall never lineally ascend."

A man was said to be *seised* of an estate of inheritance when he had taken feudal possession of the land in which the estate of inheritance had been granted (*g*).

Suppose A., being seised of an estate of inheritance, died leaving issue a son, B.; B. would be entitled to succeed as

(*b*) Bracton, f. 65.

(*c*) *Ibid.*

(*d*) Hale's Hist. Com. Law, 332, 3rd ed.

(*e*) 3 & 4 Will. IV. c. 106.

(*f*) 2 Bl. Com. pp. 206 *et seq.*

(*g*) As to what constitutes seisin, see Wms. Real Prop. p. 166, 16th ed.

the issue of the person last seised; but supposing B. died before he had taken feudal possession of the land, leaving issue a son, C.; C. could not claim the estate as the issue of B., for B. was never *seised* of the estate, and accordingly he must claim as issue of A., his grandfather, who would be in this case the person last seised.

Every person who became *seised* thus formed a new root from which the right of succession was to be traced, or, as it was expressed, *seisina facit stipitem*. The consequences of this rule will be explained later (*h*).

2. "The male issue shall be admitted before the female."

This was the old Anglo-Saxon rule (*i*).

3. "Where there are two or more males in equal degree the eldest only shall inherit, but the females all together."

4. "The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living."

These two rules may be illustrated thus:—A. dies seised of an estate of inheritance leaving issue two sons, C. the elder, and D. the younger; C. will be entitled to the estate in exclusion of D. C. takes feudal possession and then dies, leaving two daughters living, and also a grandson by a daughter who predeceased him. If the deceased daughter had been living at the death of her father, C., she and her two sisters would each have been entitled to a third of the estate, consequently her son will be entitled, *as representing her*, to her third. The two daughters and the grandson of C. will, therefore, share the estate in the same manner as if C. had left three daughters surviving. When several females succeed to an estate they are called *coparceners* (*k*). So, if A. dies seised of land, leaving a grandson by a deceased elder son,

(*h*) *Post*, p. 30.

(*k*) See *post*, p. 133.

(*i*) *Supra*, p. 8.

and a younger son, the grandson will "represent" his deceased father and thus be entitled to succeed in preference to the younger son.

5. "On failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules."

The term "*purchaser*" was used as denoting any person who acquired an inheritance in any manner except by intestate succession, or, as it was usually called, "descent" (*l*). Thus, a person who acquired an estate as devisee under a will was, in this sense, a purchaser. But it was an established rule of law that a person could not make his right heirs take by purchase, *either by conveyance or devise of the estate to them* (*m*); so if a man devised or conveyed his estate of inheritance to the person who became his heir, the heir took by *descent* and was not therefore the *purchaser*.

The collateral relation who claimed the succession must, according to this rule, have proved (1) that he was of the blood of the purchaser, and (2) that he was a collateral relation of the person last seised, for *seisina facit stipitem*.

Blood relationship can only exist where the persons are descended from a *common ancestor*. For instance:—A. has a son B. and a daughter C.; the son purchases an estate and dies intestate and without issue. Meanwhile C. has died leaving a son D. Here D. is "of the blood" of B., the purchaser, for both trace their descent from the common ancestor, A. Now suppose D. enters upon the estate of B. and then dies intestate, and without issue, his only collateral relations being his uncle X. (*who was a brother of D.'s father*), and his great uncle E. (*who was the brother of A.*). Here X. will be the nearest collateral relation to D., but he will be excluded from the inheritance, because, *having no ancestor common to*

(*l*) Litt. Tenures, s. 12.

(*m*) Co. Litt. 22 b.

*himself and the purchaser B.*, he is not “ of the blood of the purchaser ”; and so E., being the nearest collateral relation of the blood of the purchaser will be entitled to succeed to the estate.

6. “ The collateral heir of the person last seised must be his next collateral kinsman of the whole blood.”

No satisfactory explanation can be given of the introduction of this rule which excludes the half-blood from the inheritance (*n*).

Persons are relations of the half-blood when they are descended from a common paternal ancestor, but not from a common maternal ancestor, or *vice versâ*. Thus, if A. has a son B. by his first wife and a son C. by his second wife, B. will be related by the half-blood to C., and so all descendants of B. will be relations of the half-blood to C. and his descendants. But, of course, both B. and C. and their issue will be kinsmen of the whole blood to A.’s ascendants and collateral relations.

The effect of this rule in connection with the maxim *seisina facit stipitem*, may be illustrated thus:—

(1.) A. dies intestate seised of an inheritance which he had obtained by purchase, leaving issue a son B. by his first wife, and a son C. by his second wife. B. being the elder son will be entitled to succeed to A.’s estate. Now suppose B. should obtain seisin of the estate and die intestate, without issue, his only collateral relations being his half-brother C. and his paternal uncle X. In this case X. would be entitled to succeed, being of the blood of A. the purchaser and next collateral kinsman of the whole blood to B., the person last seised, while C. would be excluded, for although of the blood of A. and next collateral kinsman to B., yet he is only a collateral kinsman of the half-blood to B.

(2.) But suppose, in the case above given, B. had died *before he had become seised* of the estate, then his father, A., would be both the purchaser and also the person last seised,

(*n*) Wms. Real Prop. p. 129, 16th ed.



and B.'s half-brother C., being in this case the issue of the person last seised, would be heir to A. and entitled to succeed, in exclusion of his uncle X.

(3.) Again, suppose in the case first given the uncle X. should have succeeded B. and become seised of the estate, and should then have died without issue and intestate, leaving B.'s half-brother C. his only collateral relation. In this case C. would be entitled to succeed, being of the blood of A., the purchaser, and also the next collateral kinsman of the whole blood to X., the person last seised. If, however, X. had died before he had become seised, C. would have been entirely excluded from the succession, and the estate would have *escheated* through failure of heirs; for in this case B. would have been the person last seised, and, as we have seen, C. could not claim the estate as collateral relation to him.

7. "In collateral inheritances the male stock shall be preferred to the female; that is, kindred derived from the blood of the male ancestors shall be admitted before those from the blood of the female, unless where in fact the lands have descended from a female."

For example, supposing A. to be the person last seised, if A. should die without issue leaving a paternal uncle and a paternal great uncle, and also a maternal uncle and a maternal great uncle, the order of succession would be as follows:—

1. The paternal uncle and his descendants.
2. The paternal great uncle and his descendants.
3. The maternal uncle and his descendants.
4. The maternal great uncle and his descendants.

But if A. derived the estate from his mother's branch of the family, then the maternal uncle and great uncle would be entitled before the paternal uncle and great uncle.

If it was *doubtful* from which line the estate had in fact descended, the paternal line was always preferred.

It was formerly a disputed point whether, on failure of the issue of all the male paternal ancestors, the descent should be traced through the *nearer* or the *more remote* female paternal ancestor. For instance, where the only next of kin of the person last seised were the relations of his father's mother and the relations of his paternal grandfather's mother, which relations were entitled to priority? The question seems to have been decided in favour of the relations of the more remote female paternal ancestor (*o*), and that view has been adopted in the accompanying Table of Descent.

It must be remembered that the above rules governed the descent of inheritances where the owner died intestate *before the 1st January, 1834*. Where the death has occurred *on or after* that date the "Act to amend the Law of Inheritance" (*p*) applies, and, as we shall see (*q*), this Act has introduced several most important alterations into the old law of descent.

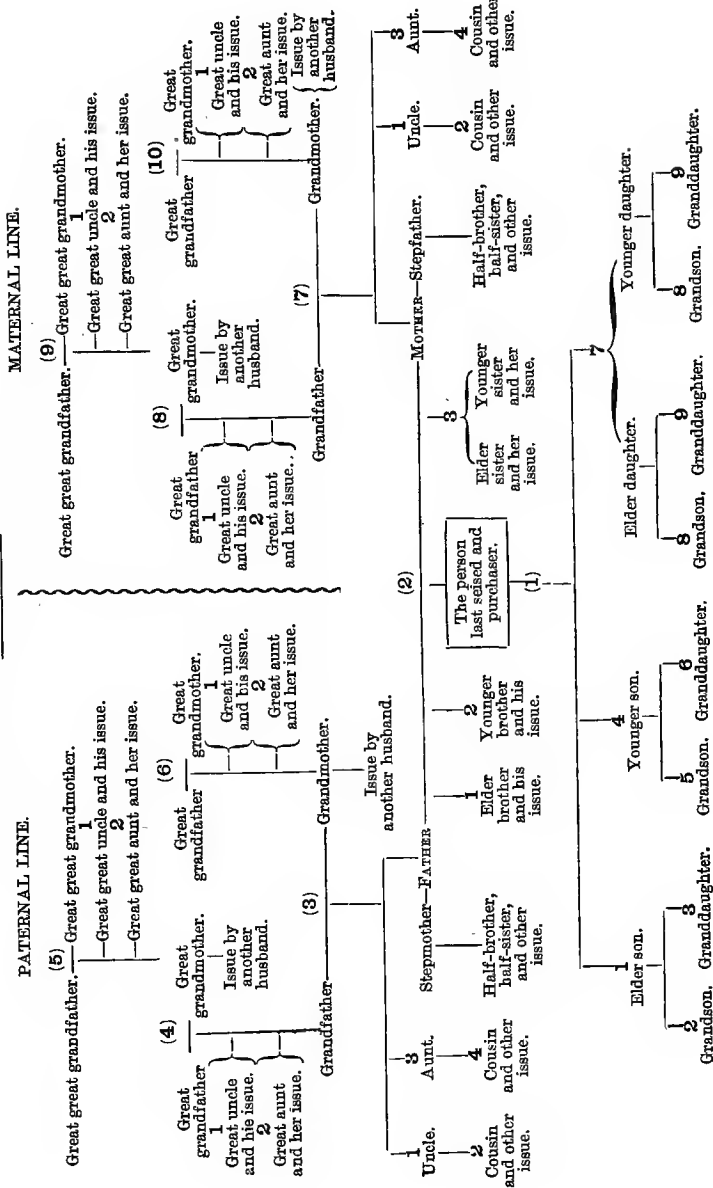
In the Table of Descent given upon the opposite page the figures (1), (2), &c., indicate the order in which the descendants of the different ancestors are entitled to succeed. The plain figures indicate the order in which the persons in each group of descendants are entitled to succeed *inter se*. Every person to whom no plain figure is affixed is excluded from the succession.

(*o*) 2 Bl. Com. p. 238; *Davies v. Lowndes*, 7 Scott, 56; 5 Bing. N. C. 169.

(*p*) 3 & 4 Will. IV. c. 106.  
(*q*) *Post*, p. 121.

## TABLE OF DESCENT

(Where the Death occurred before 1st January, 1834).



It must be observed that these rules of succession were liable to be excluded by the local customs which still prevailed in some districts. In almost every part of the county of Kent, for instance, the custom of gavelkind prevailed, and in some places the custom of borough English. When a local custom was proved to exist the rules of succession established by the general law were excluded so far as they were inconsistent with the custom (*r*).

We must now briefly refer to another kind of tenure which had become established as early as the reign of Edward IV. "Towards the end of the Anglo-Saxon period it had become common for large districts of land to be held by lords or great men, king's thanes, or others. . . . Of such districts a large portion was retained by the lord in his own hands. This portion was called *terra dominica*, *terræ dominicales*, or domain lands. On this stood the principal house, the *mansio* or manor-house as it was called in later times. The lands were cultivated for the benefit of the lord by serfs, or perhaps, in some cases, by freemen bound to render agricultural services. On the remainder of the occupied land the rights of the lord were rather in the nature of a seignory or lordship. He had no right to the actual possession of the land itself, but only to the rents or dues to be paid or rendered by the persons in occupation of the soil" (*s*). After the Conquest these districts received the name of *maneria* or manors (*t*), the lord, whether the former Anglo-Saxon lord or a Norman who had replaced him, became by commendation or grant the tenant of the king, and the free persons who formerly occupied the land in the district became freehold tenants of the lord (*u*). The remainder of the cultivated land comprised

(*r*) See *post*, p. 129.

(*s*) Digby's Real Prop. p. 24,  
3rd ed.

(*t*) A few new manors seem  
also to have been created. *Ibid.*  
p. 43.

(*u*) *Ibid.* pp. 44 *et seq.*

in the manor, the *terra dominica* or domain land, was still retained by the lord in his own hands.

So much of the domain land as was not let out to farmers was cultivated by serfs or by freemen bound to render agricultural service for the benefit of the lord, but who in return were allowed to occupy a plot of the domain land for their own benefit. These freemen and serfs became known as *villani* and the plots of lands which they occupied were said to be held by non-free tenure or *villenagium*. They held the land, however, merely at the will of their lord, and if ejected by him they had no legal remedy against him—unless, at least, the lord had entered into a covenant with the villein to secure the continued enjoyment of the tenure (*v*). But although they had, generally speaking, no legal right to the land they occupied, yet it is probable that from a very early period they acquired customary rights which were in most cases respected by the lords. The relation of lord and villein was regulated by the customs which grew up in each manor; custom defined the services or dues to be rendered or paid by the villein and determined the nature of the villein's interest in the land, and these interests were analogous to the estates of freehold tenants; in some manors the interest of the villein would be in the nature of a fee simple estate; in others of a conditional fee; in others of an estate tail. At the death of a villein who had a fee simple estate, it was sometimes the custom for all his male issue to succeed; sometimes the youngest son or other descendant alone succeeded. All questions respecting the customs of a manor were determined in the customary court of the manor, presided over by the lord or his steward, and recorded on the court roll. At the death of a tenant, or in case a tenant sold his interest, his successor, or purchaser, was not entitled to the land until he had been admitted tenant in the customary court: a memorandum of

(*v*) Digby's Real Prop. p. 244, 3rd ed.; Bracton, Lib. 4, c. 28, fol. 208.

his admission was then entered upon the court roll, and a copy of such entry upon the roll furnished the evidence of his title to the land; and from this circumstance the villeins became known as *copyholders*, and their tenure as copyhold tenure. In the reign of Edward IV. the customary rights of copyholders became recognised by the courts of law; and thenceforth, the customs of a manor, when proved by proper evidence, became rules of customary law.

This very brief and imperfect sketch of the origin of copyhold tenure (*x*) will serve to explain the reason why intestate succession to copyhold land is sometimes governed by rules peculiar to the particular locality where the land is situated, and why the rules of intestate succession in one manor often differ from those which prevail in another. But, so far as a different rule was not proved to exist, the general rules of intestate succession to freeholds, which we have seen had become settled in the reign of Edward I., applied also to copyholds (*y*).

(2) *Testamentary succession*.—By the middle of the twelfth century, the right to dispose of freehold land by will had become completely extinguished, except in the city of London and a few other places where it still survived as a local custom. Glanville explains the reason for the change as follows:—"Licet autem ita generaliter cuilibet de terra sua rationabilem partem pro sua voluntate, cuicunque voluerit, libere in vita sua donare; in extremis tamen agenti non est cuquam hactenus permissum; quia possit tunc immodica fieri hæreditatis distributio, si fuisset hoc permissum illi qui fervore passionis instantis et memoriam et rationem amittit, quod non nunquam evenire solet; unde presumeretur quod si quis in infirmitate positus ad mortem, distribuere cepisset

(*x*) As to the origin of copyhold tenure, see further Wms. Real Prop. Part III.; Digby's

Real Prop. p. 244, 3rd ed.

(*y*) See *post*, p. 130.

terram suam, quod in sanitate sua minime facere voluisset, quod potius proveniret illud ex furore animi quam ex mentis deliberatione" (z).

But the true reason seems to have been that alienation by will, like alienation *inter vivos*, was considered prejudicial to the rights of the feudal lords (a), especially to their right to acquire by escheat the land of a tenant who died without heirs.

From the time when feudalism became established until about the reign of Henry V., the power to dispose of land by will was in abeyance. In that reign the practice of conveying land to "uses" seems to have first received the sanction of the Court of Chancery (b). The effect of such a conveyance was shortly this: suppose A. conveyed land to B. to hold to the use of C.; the conveyance passed the legal estate in the land to B., and as the "use" in favour of C. was an interest unknown to the law of real property, B. could, at law, enjoy and dispose of the property as absolute owner, and C. had no remedy against him, although it was perfectly clear that A. intended to benefit C., and not B. But about the time of Henry V., the Court of Chancery commenced to intervene in such cases, and, overriding the strict letter of the law, would give effect to the *intention* of A., by compelling B. to hold the land as trustee for C.; thus B. would still remain legal owner, but C. would have the beneficial enjoyment of the land, and, besides, could compel B. to convey to him the legal estate. These new interests, or, as they were called, "uses," being the sole creation of the Court of Chancery, were consequently unfettered by the old feudal rules which still governed *legal* estates in land, and one important result was that a man could dispose of his use by will. Supposing, therefore, that A. wished to dispose of his land

(z) Glanville, Lib. 7, c. 1;  
quoted in Digby's Real Prop. p. 87,  
3rd ed.

(a) See Wright, Tenures, p. 172.

(b) Digby's Real Prop. p. 280,  
3rd ed.

by will, all he had to do was to convey his land to B. "to the use" of himself (A.), or "to the use" of his (A.'s) will: he could then dispose of this use by his will, and B. would be compelled by the Court of Chancery to convey the legal estate to the person or persons to whom the use was devised.

This testamentary power was put an end to by the *Statute of Uses* (c), which, after stating in the preamble that by the common law "lands, tenements, and hereditaments be not devisable by testament," and that by the introduction of wills of uses "divers and many heirs have been unjustly at sundry times disinherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fair fitz chivalier*, and *pur file marier*, and scantily any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or execution for their rights, titles, and duties," provides that the person in favour of whom the use was declared, *i. e.*, the *cestui que use*, shall be deemed to have the same legal estate as that of the person to whom the conveyance was made, *i. e.*, the *feoffee to uses*. The use was thus, by force of the statute, turned into the legal estate with all its feudal incidents and restrictions.

Probably this new abolition of testamentary power over land met with great opposition in the country; at any rate, six years later, an Act was passed (d) whereby power was given to tenants in fee simple to dispose by will of *all* their lands held by *socage tenure*, and of *two-thirds* of those held by *knight service*; but the rights to primer seisins, reliefs, and fines on alienation, in the case of socage lands, and of wardship over the third part of knight service lands, were preserved in favour of the King or other lord.

Finally, by the Act for the abolition of military tenures (e),

(c) 27 Hen. VIII. c. 10.

c. 5, s. 3.

(d) 32 Hen. VIII. c. 1; interpreted by 34 & 35 Hen. VIII.

(e) 12 Car. II. c. 24.



which came into operation on the 24th February, 1645, tenure by knight service was turned into free and common socage tenure; so that, after that date, free and unrestricted power of testamentary disposition over freehold land was established, and is still the rule.

The right to dispose of copyhold land by will depended upon the custom of the manor wherein the land happened to be situated.

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## PART II.

THE RIGHTS AND OBLIGATIONS WHICH PASS BY  
SUCCESSION, AND THEIR DIVISIONS.

WE must in the first place attempt to discover what classes of rights and obligations are capable of passing from a deceased person to his representatives ; and for this purpose it will be necessary to take a general survey of all the various classes of rights which may be vested in a person in his private capacity, and the various classes of obligations to which he may be subject. We limit the inquiry to the rights and obligations of a person in his private capacity for the simple reason that where a person is acting in a public capacity his rights and obligations are attached to the office which he holds, and not to him personally ; at his death such rights and obligations pass to his successor in the office, but they do not pass to such successor as *representing the deceased holder* of the office, but as the person who for the time being is to perform the functions of the office. So long as a public office is allowed to exist the rights and obligations attached to it are not affected by the death of the person who chances to be the holder of it ; and the death of the holder for the time being extinguishes all his official rights and obligations. Of course where the holder of the office has exceeded his official rights or neglected his official obligations, and thereby caused injury to another person, his representatives may, at his death, be liable ; the reason being that in such cases he has acted unlawfully, and is liable, like every other citizen, for

the consequences. Such wrongful acts or omissions are either crimes or civil injuries (*a*).

Having attempted to ascertain what rights and obligations are capable of passing by succession, we must in the next place inquire how they are divided between the real and personal representatives of the deceased. The whole mass of *rights* which pass by succession constitute what is called "the estate" of the deceased; of such rights those which pass to the real representatives constitute what is called "the real estate," while those which pass to the personal representatives constitute what is called "the personal estate." We have, therefore, to divide rights into those which constitute "real" and those which constitute "personal" estate.

Having dealt with rights, we must then inquire what obligations pass to the real and personal representatives respectively.

Accordingly the subject will be dealt with under the following heads:—

1. The rights and obligations which pass by succession.
2. Real and personal estate.
3. The manner in which the obligations of deceased persons are divided between their real and personal representatives.

(*a*) See *post*, p. 51.

## CHAPTER I.

## THE RIGHTS AND OBLIGATIONS WHICH PASS BY SUCCESSION.

WE will deal first with rights and secondly with obligations.

A. *Rights.*

We will first divide rights into *antecedent* and *remedial*. Antecedent rights are rights which exist before any wrongful act or omission, *e.g.*, the right of the owner of a garden that no one should trespass upon it, of a servant to have his wages paid, of a purchaser to have goods delivered to him (*a*). Remedial rights are rights which "are given merely in substitution or compensation for rights antecedent, the exercise of which has been impeded, or which have turned out not to be available," *e.g.*, the right of the owner of a garden to damages from a party of men who have broken into his garden, of a servant to sue his master for unpaid wages, of a purchaser to get damages from a vendor who refuses to deliver the goods sold (*a*).

I. *Antecedent Rights.*

Antecedent rights are either rights *in rem* or rights *in personam*.

A right *in rem* is a right available against *all persons indefinitely* (*b*); *e.g.*: A. is owner of land, he has a right that *no one* should trespass upon his land.

A right *in personam* is a right available only against *a definite person or persons* (*b*); *e.g.*: A. has entered into a contract with B. whereby B. has undertaken to do work for

(*a*) Holland's Jurisprudence, p. 125, 4th ed.

(*b*) *Ibid.* p. 123.

A.; in this case B. is the only person from whom A. has a right to demand performance of the contract.

### 1. Antecedent rights *in rem*.

For our present purpose these may be divided into the two following classes:—

(1) Rights *in rem* which are more or less closely connected with the personality of the individual in whom the right resides (*c*).

Under this class are included the right to personal safety and freedom, to reputation, to the society and control of one's family and dependents, to enjoy the advantages open to the community generally (as the free exercise of one's calling, &c.), to immunity from fraud (*d*).

It is obvious that all these rights must be extinguished by the death of the person in whom they reside.

(2) Rights *in rem* which are unconnected with the personality of the individual in whom they reside.

Under this class are included all rights to the possession and ownership of property (*e*).

All such rights *in rem* pass by succession at the death of the person in whom they were vested, except where the right consists merely of a *life interest* in property.

We have, therefore, to inquire in what cases a person has merely a life interest in property. We will first take real property, and afterwards personal property (*f*).

### *Life interests in Real Property.*

(i.) Where a person is sole owner of real property he will, in the following cases, have merely a life interest:—

(a) Where he acquired the property by a conveyance *inter vivos*, which did not expressly limit the property to the

(c) Holland's Jurisprudence, p. 143, 4th ed.

(d) *Ibid.* pp. 144 *et seq.*

(e) See *ibid.* p. 157, 4th ed.

(f) As to the difference between real and personal property, see *post*, p. 60.

grantee and his "*heirs*," whether with or without words of procreation, or (in case the conveyance was executed after the 31st December, 1881) to him "*in fee simple*," or "*in tail*" (*i*). Any other limitation, *e.g.*, to "A. and his assigns for ever," to "A. and his seed for ever," &c., gives merely a life estate.

(b) Where he acquired the property under a will which expressly gave him merely a life interest, or from which an intention to give merely a life interest could be implied. The reader will find this subject dealt with at p. 236, *post*.

(c) Where, either by deed or will, he acquired an estate tail in the property (*i.e.*, where by a conveyance *inter vivos* the property is expressly limited to him and his *heirs* with words of procreation, as, "*the heirs of his body*"; or, in case the conveyance was executed after 31st December, 1881, to him "*in tail*"; or where a will contains the same limitations or any others which show an intention to confer an estate tail (*k*)), he has practically a life interest only in the property, *unless he bars the entail*. If he bars the entail he can acquire an estate in fee simple (*l*), which, of course, he may devise by will, and which, if not devised, will pass to his heir. If he does not bar the entail during his lifetime, his interest ceases at his death, and the heir of his body takes the property, not as successor to the deceased, but as the donee of the person who originally granted the property to the deceased in tail.

An entail can only be barred by deed inrolled; it cannot be barred by will or contract (*m*).

(d) Where by will or by conveyance *inter vivos* real property has been given to another person to hold in trust for him, and an intention that he shall only have such beneficial

(*i*) 44 & 45 Vict. c. 41, s. 51.

(*k*) See *post*, p. 236.

(*l*) Either an ordinary estate in fee simple, or a base fee, *i.e.*, one which is extinguished when the

heirs of his body become extinct. Wms. Real Prop. p. 75, 15th ed.

(*m*) Wms. Real Prop. p. 73, 16th ed.

interest for life is expressed in, or can be implied from, the terms of the will, or, in case of a conveyance *inter vivos*, an intention to confer a beneficial interest for life only is expressed in, or can be implied from, the deed of conveyance, or some other deed or writing.

(e) Where a husband holds real property of his wife, by virtue of his marital right, or where a widower holds real property of his late wife as *tenant by the curtesy* (*n*); or where a widow holds real property, which belonged to her late husband, by virtue of her right to *dower* (*o*), or *freebench* (*p*).

It must be observed that in cases where the marriage has taken place on or after the 1st January 1883, all the wife's real and personal property remains her separate property (*q*); and, in cases where the marriage took place before that date, all property acquired *after* that date is the wife's separate property (*r*). Formerly (in the absence of any settlement), the husband acquired a right to all the wife's real estate, except freehold or copyhold or customaryhold property which any woman who was married *after the 9th August, 1870*, had acquired as heiress or co-heiress of an intestate (*s*). And this marital right continued so long as the coverture lasted.

(f) Where a person acquires an office to which real property is attached his interest in the property, of course, comes to an end when he vacates the office by death; *e.g.*, the land belonging to a rectory or vicarage.

At the present time it seems that the only hereditary public office of any practical importance in Great Britain is that of sovereign of Great Britain.

(ii.) Where a person is co-owner with one or more other persons, and the co-ownership constitutes what is called a *joint tenancy* (*t*), each co-owner has in reality merely a life

(*n*) See *post*, p. 136.

(*o*) See *post*, p. 134.

(*p*) See *post*, p. 135.

(*q*) 45 & 46 Vict. c. 76, s. 2.

(*r*) Sect. 5.

(*s*) 33 & 34 Vict. c. 93, s. 8.

(*t*) In order to constitute a joint tenancy there must be the four

interest, even where the property was acquired by them in fee simple. For the general rule is that at the death of one joint tenant his interest is extinguished and the survivor or survivors have a right to the whole property by survivorship.

But to this rule there are certain exceptions.

(a) Where the property is held for the purpose of some trade, or trading partnership, or other commercial transaction, and one joint tenant dies, the survivor or survivors will be regarded merely as trustees of the property to the extent of the deceased joint tenant's share (*u*), *i. e.*, the representatives of the deceased will have an equitable right to his share, although the legal right to the whole property is vested in the surviving joint tenant, or joint tenants, by survivorship.

(b) Courts of equity have always looked with disfavour upon joint tenancies, and have seized upon any circumstance which seemed to indicate an intention that the survivor should not take the whole beneficial interest, as furnishing an equitable ground for interfering, and treating the survivor merely as a trustee of the deceased tenant's share for the benefit of his representatives (*x*). Thus, where A. and B. purchase land and it is conveyed to them jointly in fee simple, but they pay the purchase-money in *unequal* shares, this circumstance will furnish sufficient evidence that A. and B. did not intend that the survivor should have the whole beneficial interest (*y*).

### *Life Interests in Personal Property.*

(i.) Where a person is sole owner of personal property, he will, in the following cases, have merely a life interest :—

(a) Where land has been granted to him for a term of unities, *i. e.*, (1) unity of possession; (2) unity of interest; (3) unity of title; and (4) unity of the time of the commencement of such title. See *Wms. Real Prop.* pp. 157 *et seq.*, 16th ed., where the difference between joint tenancies and tenancies in common is pointed out.

(*u*) *Wms. Personal Prop.* p. 395, 13th ed.

(*x*) *Snell's Equity*, 137, 8th ed.

(*y*) *Lake v. Gibson*, 1 White & Tudor's L. C. p. 198.



“99 years [or any other definite term] if he shall so long live” (z), or with similar words showing an intention to give only a life interest.

(b) Where he has acquired a *term of years* under a will which expressly gave him a life interest, or from which an intention to give merely a life interest could be implied.

This is the only exception admitted by the common law to the rule that the *absolute ownership* of personal property can alone be recognised by the Courts (a).

(c) Where he has acquired any personal property under a will, or by assignment *inter vivos*, (except a term of years under a will), and the will expressly or by implication expresses an intention that he shall only have a life interest, or, in the case of an assignment *inter vivos*, it is declared by deed or writing, or even, it seems, by word of mouth, unless the property be a term of years (b), that he shall only have a life interest, this limitation will be recognised by the rules of equity, unless indeed the property be of a kind *quæ ipso usu consumuntur* (as wines, &c.), and he will have a *beneficial* interest for life only (c). His *legal interest* passes in such cases to his representatives, for, as we have seen, the rules of common law, with one exception, only recognise the absolute ownership of personal property (d), but such representatives will hold the property merely as trustees for the persons who may have an equitable right to it.

(d) Where by will or assignment *inter vivos* any personal property has been given to another person to hold in trust for him, and an intention that he shall only have the beneficial interest for life is expressed in or can be implied from the

(z) Wms. Real Prop. p. 446, 16th ed.

(a) See Wms. Personal Prop. p. 339, 13th ed.

(b) Snell's Equity, pp. 53, 54, 8th ed.

(c) Wms. Personal Prop. pp. 341, 342, 13th ed.

(d) *Supra*.

terms of the will, or, in the case of an assignment *inter vivos*, an intention to confer merely a beneficial interest for life is declared by deed or other writing, or even, it seems, by parol, provided the property be not a term of years (e).

(ii.) Where a person is co-owner with one or more other persons, and the co-ownership constitutes a *joint* ownership (as opposed to an ownership in *common* (f)), each joint-owner has, in effect, merely a life interest in the property. For the general rule is that at the death of one joint owner his interest is extinguished, and the survivor or survivors have a right to the whole property by survivorship.

But to this rule there are certain exceptions.

(a) Where the property is held for purposes of trade, the share of a deceased joint-owner vests in his personal representatives (g). This right of the personal representatives is conferred by the common law "for the advancement and continuance of commerce and trade which is *pro bono publico*, for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*" (h).

(b) Joint ownership of personal property, like joint tenancy of real property, is not favoured by equity, and therefore courts of equity have laid hold of almost any circumstances from which it could be reasonably implied that ownership in common was intended (i).

## 2. Antecedent rights *in personam*.

These are divisible into two chief classes, namely, (1) rights *in personam* not arising from contract, and (2) rights *in personam* arising from contract (k).

(e) Snell's Equity, pp. 53, 54, 396, 398, 13th ed. 8th ed.

(f) Wms. Personal Prop. p. 392, 13th ed.

(g) *Ibid.* p. 395.

(h) 1 Wms. Exors. p. 656, 8th ed.

(i) Wms. Personal Prop. pp.

(k) Holland's Jurisprudence, p. 201, 4th ed. Professor Holland describes class (1) as rights arising "*ex lege*." For definitions of a contract, see *ibid.* p. 211, and Anson, Contracts, p. 9, 5th ed.

(1) Rights *in personam* not arising from contract.

Under this class are included the following rights *in personam* (*l*) :—

(i.) *Domestic, i. e.*, those existing between husband and wife, parent and child, guardian and ward.

These rights are of course extinguished by the death of either party.

(ii.) *Those existing between a trustee and cestui que trust, executor and legatee and creditors of a deceased testator, administrator and next of kin and creditors of a deceased intestate* (*m*).

All rights of the *cestui que trust*, legatee, next of kin, and creditors pass by succession; except in cases where the *cestui que trust* or legatee has merely a *life interest* in the property held by the trustee or executor; and even in these cases the representatives of the deceased *cestui que trust* or legatee will have a right to any part of the income which has accrued due before the death.

The rights of the trustee, executor, and administrator pass to a successor in the manner to be explained later on (*n*). Generally speaking, this successor is not the representative of the deceased.

(iii.) *Quasi-contractual* (*m*), (*o*), *i. e.*, those which arise where, without agreement or breach of duty or obligation, A. has paid something which B. ought to pay, or B. has received something which A. ought to have received, or A. has performed some service for B. for which B. ought to compensate

(*l*) Holland's Jurisprudence, pp. 202 *et seq.*, 4th ed.

(*m*) For our present purpose it seems advisable to adopt this division, instead of following that of Professor Holland (Jurisprudence, pp. 204—206, 4th ed.), but obviously it is not a scientific one.

(*n*) *Post*, pp. 147, 251.

(*o*) This seems to be the most convenient term for describing this miscellaneous group of rights; see Anson, Contracts, pp. 8, 370—372, 5th ed. It will be observed that the term is not used in the wide sense attached to quasi-contract in Roman Law.

him. For example, the right of one of several co-debtors, who has paid the whole debt, to recover from each of the others his proportionate share; the right to recover money from A. which had been paid to him under the mistake that he was B.; the right of salvors of ships in distress to compensation from the owners; the right of those who have supplied necessities to lunatics and drunken persons, incapable of entering into an agreement, to be paid for the necessities (*p*).

Such rights pass to the representatives of the deceased person in whom they were vested.

(iv.) *Official, i. e.*, the right to call upon a public official to exercise his functions. "Such rights are enforced in English law against all ministerial officers, as collectors of customs, registrars of births, bishops, lords of manors, sheriffs, or postmen; but high officials, such as the Postmaster-General, are not responsible for the negligence of their subordinates" (*q*).

Where such rights are merely personal, *e. g.*, the right to call upon a bishop to induct to a benefice, they are of course extinguished by the death of the person in whom they are vested; in other cases, *i. e.*, when they affect his property, they pass to his representatives.

From these rights against the official must be distinguished the rights of public officials against definite members of the community, *e. g.*, the right of a tax-collector to receive income tax from every person whose income exceeds a fixed sum. At the death of the official such rights pass, of course, to his successor in the office, and not to his representatives: such rights are attached to the *office*, and not to the person who exercises it.

(*p*) *Gore v. Gibson*, 13 M. & W. 623; *Baxter v. Portsmouth*, 5 B. & C. 170.      (*q*) *Holland's Jurisprudence*, p. 207, 4th ed.

(2.) Rights *in personam* arising from contract.

We will divide contracts into two classes, namely (i.) contracts whereby a single person acquires rights against another or others, and (ii.) contracts whereby two or more persons jointly acquire rights against another or others.

(i.) Where a single person acquires rights under a contract, such rights will pass at his death to his representative, unless the act or forbearance due under the contract is *intimately dependent upon the individuality* of the deceased, in which case the right is of course extinguished by his death; *e. g.*, the rights under a contract to marry, or to enter into a partnership, are extinguished by the death of either party to the agreement.

(ii.) Where two or more persons jointly acquire rights under a contract, the general rule is that, at the death of one, his rights pass to the surviving contractor or contractors; but where the contract has been entered into for the purpose of some trade or commercial undertaking which the co-contractors were carrying on as partners, the representatives of a deceased co-contractor will be entitled to a share of any benefit which the survivor may derive from the contract (*r*).

## II. Remedial rights.

The infringements of antecedent rights constitute either *crimes* or *civil injuries*; the distinction is that civil injuries are an "infringement or privation of the private, or civil, rights belonging to individuals, considered as individuals; crimes are a breach of public rights and duties which affect the whole community, considered as a community" (*s*). Where the infringement constitutes a crime, the wrong-doer will be punished by the state, and, generally speaking, the individual who is injured will have no remedial right; his death, there-

(*r*) 1 Wms. Exors. p. 850, 8th ed.(*s*) 2 Bl. Com. p. 2.

fore, will not affect the liability of the wrong-doer. In some cases, however, the injured party has a remedy independently of the prosecution by the State—in some cases of libel for instance—and this remedial right is subject to the same rules as those arising from civil injuries.

When the infringement constitutes a civil injury, the injured party always has a remedial right against the wrong-doer.

Civil injuries may be divided into the three following classes—1. Breaches of Trust; 2. Breaches of Contract; and 3. Torts.

1. *Breaches of trust.*—These are infringements by the trustee, executor, or administrator, of the rights *in personam* of the *cestui que trust*, legatee, next of kin, or creditors of a deceased person. Where the breach of trust consists in the mismanagement or misapplication of the estate of a deceased person by the executor or administrator it is termed, in technical language, a *devastavit*.

Where a breach of trust or *devastavit* has been committed the injured party has a right that the trustee, executor, or administrator should make good the loss which he has caused, and this right passes, at the death of the injured party, to his representatives. If, for instance, 1,000*l.* has been given to A. in trust to invest it in Government securities and to hold such securities in trust for B., and A. lends the money on personal security to X. who becomes bankrupt, and in consequence 900*l.* is lost, B. will have a right that A. should make good the 900*l.* out of his own property, and if B. should die before he has enforced his right his representatives will be entitled to enforce it.

2. *Breaches of contract.*—These are infringements of the rights *in personam* arising from contract. In all cases the injured party may sue for damages for the breach, but in some cases he may, instead of suing for damages, bring an

action for specific performance, *i.e.* to compel the other party to perform the contract.

At the death of the injured party these rights pass to his representatives, unless the contract is of that class which, we have seen (s), are extinguished by his death. Where the contract is of that class, the maxim *actio personalis moritur cum personâ* (t) applies, and the right to sue for the breach does not pass to the representatives of the deceased, unless it has resulted *in actual loss to the estate of the deceased*, and then only for the amount of the actual loss. Thus in *Chamberlain v. Williamson* (u), A. promised to marry B., and broke his promise; B. died without having sued A. for breach of promise of marriage; and her executor brought the action: the Court held that the executor could not bring the action, since it was not certain that the breach of contract had caused damage to the estate, for “although marriage may be regarded as a temporal advantage to the party as far as respects personal comfort, still it cannot be considered as an increase of the transmissible personal estate.” On the other hand, in *Bradshaw v. Lancashire & Yorkshire Ry. Co.* (x), A. had been injured in a railway accident, and died after incurring the expense of medical attendance rendered necessary in consequence of the injuries he had sustained: it was held that the representatives of A. could not sue for breach of the implied contract to carry the deceased safely, but that they had a right of action to recover the amount of the actual loss incurred by his estate in consequence of the medical expenses.

3. *Torts*.—These are all infringements of rights *in rem* or *in personam* except breaches of trust and breaches of contract. This is somewhat wider than the meaning usually attached to the term *tort* in English law (y), but is convenient for our present purpose.

(s) *Supra*, p. 51.

(t) For the most recent exposition of this maxim, see *Finlay v. Chirney*, 57 L. J. (N. S.) Q.B. 247.

(u) 2 M. & S. 408.

(x) L. R. 10 C. P. 189.

(y) See Holland's *Jurisprudence*, p. 269, 4th ed.

Where a tort has been committed, the injured party has a right to sue the wrongdoer for damages, and the general rule is that this right to sue is extinguished by the death of the injured party—this being another case where the maxim *actio personalis moritur cum personâ* applies.

To this general rule there are the following exceptions:—

(1) Where a person has been accidentally killed in consequence of some wrongful act, neglect, or default of another person, *Lord Campbell's Act* (z), confers a right of action for damages upon the personal representatives of the deceased; and (if the personal representatives do not bring the action within six months after the death) upon the persons beneficially interested. But the action can only be brought for the benefit of the widow, husband, parents, or children of the deceased, and the jury who assess the damages are to direct by their verdict the manner in which such damages are to be distributed.

(2) The personal representatives of a deceased person have a right to sue the wrongdoer in respect of any injury to the personal estate of the deceased, provided such injury has rendered the estate *less beneficial to the personal representatives* (a); e.g., a horse belonging to A., and which is worth 100*l.*, is wrongfully injured by B., and in consequence its value is reduced to 20*l.*; A. dies before he has sued B. A.'s personal representatives will have a right to sue B. for 80*l.*, which represents the loss to the estate caused by the wrongful act of B.

(3) The personal representatives of a deceased person may bring the *same action* for injuries done to the *real or personal* estate as the deceased might have brought had he lived, *provided the injury has been committed within six calendar months before the death of the deceased, and the action is brought within one year after his death* (b). If this proviso be not fulfilled, the

(z) 9 & 10 Vict. c. 93.

p. 797, 8th ed.

(a) 4 Edw. III. c. 7; 15 Edw. III. c. 5. See 1 Wms. Exors.

(b) 3 & 4 Will. IV. c. 42, s. 2.



personal representatives have no right of action, unless the case comes within exception (2), *i. e.*, there is actual loss to the personal estate; but if *it be fulfilled*, the representatives have the same right of action as the deceased, and are not bound to prove actual loss: *e. g.*, they could sue for a mere trespass, although no positive loss could be shown to the personal estate.

N.B.—Where a person has brought an action to enforce a remedial right, arising out of either breach of contract or tort, and before his death has obtained judgment or even a verdict in his favour, the benefit of the judgment or verdict will pass, at his death, to his representatives (*c*), although the remedial right may have been one which would have been extinguished by his death; *e. g.*, if A. has sued B. for damages for breach of promise of marriage, and has obtained a verdict for 100%. damages, and dies the moment after the verdict, the right to payment of the 100%. will pass to A.'s personal representatives; so if A. has obtained a verdict for 10%. damages against B. for an assault, or libel, the right to the 10%. will pass in like manner at A.'s death. But the bringing of an action has no such effect if the plaintiff should die before obtaining judgment or a verdict.

### B. *Obligations.*

The terms “duty” and “obligation” have been used as synonymous by some writers (*d*), and it is therefore necessary to explain the meaning attached to them in the following pages.

A duty is the general liability to respect rights *in rem* which is imposed by the law upon every person other than the person in whom the right is vested; in other words, a duty is the liability which correlates to a right *in rem*: *e. g.*,

(c) 2 Wms. Exors. p. 1747, Court, 1883, Ord. XVII. r. 1.  
8th ed.; Rules of the Supreme (d) Austin and Bentham.

A. is owner of a farm ; every other person is under a duty to respect A.'s rights of ownership.

An obligation is the special liability imposed by law upon a definite person or persons against whom another definite person has a right ; in other words, an obligation is the liability which correlates to a right *in personam* (e) : *e. g.*, B. has contracted to perform some service for A., or B. has assaulted A. ; in each case A. has a right *in personam* against B., and B. is under an obligation to A.

It is obvious that *duties* as above defined cannot pass from one person to another, for they are common to every citizen : we are therefore only concerned with *obligations*.

As obligations correlate to rights *in personam*, they may be divided in the same manner.

I. Obligations which correlate to antecedent rights *in personam*.

1. Where the right *in personam* does not arise from contract.

(1) *Domestic Obligations*.—These are extinguished by the death of husband or wife, parent or child, guardian or ward.

(2) *Obligations existing between trustee and cestui que trust, executor and legatee and creditors, administrator and next of kin and creditors*.—These obligations pass to a successor in the manner explained later on (f), except where the obligation is personal to a trustee—where for instance a discretionary power is given to him by the creator of the trust which is to be exercised in performing the trust (g). As a rule, the successor is not the representative of the deceased.

(3) *Quasi-contractual Obligations*.—These pass to the representatives of the deceased person who had incurred them.

(4) *Official Obligations*.—The obligations of a public official pass to the person who is appointed to succeed to the office,

(e) See Anson, *Contracts*, p. 6, 5th ed.; Holland's *Jurisprudence*, pp. 199, 200, 4th ed. (f) *Post*, pp. 147, 251. (g) See *post*, p. 149.

and not of course to the representatives of the deceased official.

The obligations of a private person to public officials pass to his representatives, except where the obligation was merely personal to the deceased; *e. g.*, the obligation to pay a tax will pass, but the obligation to obey a summons of the sheriff to serve on a jury is of course extinguished by death.

## 2. Where the right *in personam* arises from contract.

(1) Where a single person incurs an obligation under a contract, such obligation will, at his death, pass to his representatives, unless the performance of the contract is *intimately dependent upon the individuality of the deceased*; *e. g.*, the obligations arising from a contract to marry, to enter into a partnership, to sing at a concert, are extinguished by death.

(2) Where two or more persons jointly incur an obligation under a contract, the general rule is that, at the death of one, his obligation is extinguished, and the surviving contractor or contractors alone remain liable to discharge the whole obligation. But where the contract has been entered into for the purpose of some trade or commercial undertaking which the co-contractors were carrying on as partners, the representatives of a deceased co-contractor will be liable to share any loss incurred under the contract by the survivor (*h*).

## II. Obligations which correlate to remedial rights *in personam*.

1. Where the right *in personam* arises from a breach of trust.

The obligation to make good losses occasioned by a breach of trust passes to the representatives of the trustee, executor, or administrator (*i*).

(*h*) 2 Wms. Exors. pp. 1747, 1748, 8th ed.

*Cadogan*, 17 Ves. 485; as to executors and administrators, 4 Will. & M. c. 24, s. 12.

(*i*) As to trustees, *Mountford v.*

2. Where the right *in personam* arises from breach of contract.

The obligation to pay damages for breach of contract, or, in some cases (*k*), to specifically perform it, passes to the representatives of the deceased contractor, except when the contract was of that class which, we have seen, are extinguished by death (*l*), for in these cases the maxim *actio personalis moritur cum personâ*, applies: *e.g.*, A. was engaged to marry B., broke his promise, and died; B. sued A.'s executors for damages for breach of promise of marriage: it was held that the action would not lie (*m*). But it seems probable that even in these cases the representatives of a deceased person would be liable to make good any *actual pecuniary loss* which has been caused by the breach of contract of the deceased.

3. Where the right *in personam* arises from tort.

Here the maxim *actio personalis moritur cum personâ* again applies, and all obligations to pay damages for tort are extinguished by the death of the wrongdoer. But to this rule there are the following exceptions:—

(1) Where the personal estate of the deceased wrongdoer has derived actual benefit from the tort, his personal representatives are liable to be sued for damages *to the amount of such actual benefit*. It seems that such benefit must consist in the "acquisition of property or its proceeds or value" (*n*).

(2) By 3 & 4 Will. IV. c. 42, s. 3, it is provided that the personal representatives of a deceased person may be sued for any wrong committed by the deceased in his lifetime "to the *property*, real or personal," of another person; *provided such injury has been committed within six calendar months before such deceased person's death, and provided the action be brought within six calendar months after his personal representatives had taken upon themselves the administration of his estate.*

(*k*) See Anson, Contracts, p. 317, 5th ed.

(*l*) *Supra*, p. 51.

(*m*) *Finlay v. Chirney*, 57 L. J. (N. S.) Q. B. 247.

(*n*) *Phillips v. Homfray*, 26 Ch. D. 439, 454.

It will be observed that unless these provisoes are fulfilled, no obligation for tort passes to the representatives of the deceased, unless the case falls under exception (1), and that these exceptions only relate to injuries to the *property* of the deceased.

N.B.—Where an action has been brought against a person for breach of contract or tort, and judgment, or even a verdict, has been obtained against him, the judgment or verdict will, at his death, be binding upon his representatives, even though the breach of contract or tort may have been one which would have been extinguished by his death (*o*): *e. g.*, A. has sued B. for breach of promise of marriage and obtained a verdict for 100% damages; B. dies; his representatives will be bound to pay the 100%. So if A. has obtained a verdict for 10% damages against B. for an assault, and then B. dies, B.'s representatives will be bound to pay the 10%. But in such cases the mere bringing of an action imposes no obligation on the representatives of the defendant if he should die before judgment or a verdict has been obtained.

*Liability for Crime.*—Before leaving the subject of obligations it must be mentioned that where the infringement of a right constitutes a *crime*, the liability for the crime is extinguished by the death of the wrongdoer.

(*o*) 2 Wms. Exors. p. 1747, 8th ed.; Rules of the Supreme Court, 1883, Ord. XVII. r. 1.

## CHAPTER II.

## REAL AND PERSONAL ESTATE.

THE real estate of a deceased person consists of those rights which will pass by succession to his real representatives; his personal estate consists of those rights which will pass by succession to his personal representatives. We will deal first with rights *in rem*, and secondly with rights *in personam*.

A. *Rights in rem.*

We have already seen that the only rights *in rem* which pass by succession are rights *in rem* over property (a).

The question whether a given right *in rem* passes to the real representatives, or whether it passes to the personal representatives, of the deceased, depends upon the nature of the property which forms the subject-matter of the right. If such property be *real property* it passes to the real representatives; if it be *personal property*, it passes to the personal representatives. The question, therefore, which we have to consider is, what property is real and what personal (b).

The basis of the division of property into real and personal is the distinction, recognised at a very early period of English law, between land and moveables (c), and the general rule is, that all estates and interests in land are real property, while moveables, and all interests in moveables, are personal property. To this general rule there are a number of exceptions,

(a) *Supra*, p. 43.

(b) As to the origin of the terms *real* and *personal*, as applied to property, see Markby's Elements

of Law, ss. 129, 130; and Wms. Real Prop. pp. 6 *et seq.*, 16th ed.

(c) *Supra*, p. 15.

some of which appear to date, like the rule, from an early period, while others have been introduced from time to time as new kinds of property, or interests in property, came into existence.

It would be impossible, within the limits of this treatise, to enumerate all the exceptions to the general rule, but the more important are included in the following general statement.

*Real property* comprises all freehold and copyhold estates, whether in possession, reversion, or remainder, easements and profits whether appendant or appurtenant, seignories and advowsons whether appendant or *in gross*, rents seek, rentcharges, and commons *in gross*, and everything growing on, or permanently attached to, land, as trees, or houses or other buildings, or “*fixtures*,” *i.e.*, things permanently affixed to houses or other buildings or land.

*Personal property* comprises all moveable property and all interests in moveable property, *e.g.*, horses, sheep, money, plate, furniture not permanently affixed to a house, trees which have been cut or blown down, fixtures which have been severed from the land or building to which they were attached, stock in the public funds, securities for money (*b*), &c., &c.

### *Exceptions.*

The following kinds of property are personal :—

1. Terms of years and leases of land (*c*).
2. Emblements, *i. e.*, things growing upon land, but which are the annual produce of agricultural labour, such as crops of grain, flax, hemp, or roots (*d*).
3. Shares in canal and railway companies are generally made personal property by the Acts of Parliament under which such companies have originated; but it seems that (in

(*b*) As to mortgages of real property, see *post*, p. 139.

(*c*) See *Wms. Real Prop.* p. 10, 16th ed., where the origin of this

exception is explained.

(*d*) *Wms. Personal Prop.* p. 25, 13th ed.; and see further, as to emblements, *post*, p. 145.

the absence of express legislation) shares in companies, formed for an object which is necessarily connected with the holding of land, are, as a rule, real property (*e*), but in other cases they are personal, although the company may have power to hold land (*f*).

4. Real property acquired by partners for partnership purposes is, as a general rule, considered personal to this extent, that at the death of a partner the *equitable right* to his share will pass to his executor or administrator, and not to his heir. But the terms of the partnership agreement may be such as to exclude the general rule (*g*).

(This exception is founded upon the doctrine of conversion, see next page.)

5. Where a tenant *pur autre vie* dies without having devised his estate, and there is no special occupant, the estate *pur autre vie* passes to the executor or administrator of the tenant (*h*).

6. The next presentation to a benefice is personal property in two cases.

(1) When the benefice has become vacant. In this case the right to present is "a chattel personal, like rent due or any other fruit fallen" (*i*).

(2) When the owner of the advowson has granted the next presentation to another person. The right to present, although the benefice is not vacant, will be personal property of the grantee (*i*).

The following kinds of property are real.

1. Title deeds of land.

2. Heir-looms. "They may be defined to be such personal

(*e*) *Buckeridge v. Ingram*, 2 Ves. jun. 653.

(*f*) *Bligh v. Brent*, 2 Yon. & Coll. 268.

(*g*) 1 Lindley, Partnership, p. 670.

(*h*) 29 Car. II. c. 3, s. 12, repealed and virtually re-enacted by 7 Will. IV. & 1 Vict. c. 26, ss. 3, 6; Wms. Real Prop. p. 26, 16th ed.

(*i*) 1 Wms. Exors. p. 676, 8th ed.



chattels as go, by force of a *special custom*, to the heir, along with the inheritance, and not to the executor or administrator of the last owner. . . . The ancient jewels of the Crown are heir-looms. And if a nobleman, knight, or esquire be buried in a church, and his coat armour or other ensigns of honour be set up, or if a tombstone be erected to his memory, his heirs may maintain an action against any person who may take or deface them. The boxes in which title-deeds of land are kept are also in the nature of heir-looms" (k).

In popular language the term "heir-looms" is generally applied to plate, pictures, &c., assigned by deed or bequeathed by will to trustees in trust to permit the same to be used for the time being by the owners of certain real estate (k). Such heir-looms are not real property; the right to use them passes to the owner of the land by reason of the trust.

### 3. Titles of honour, *e. g.*, peerages.

It must be observed that *equitable rights in rem* are subject to the same rules as *legal rights in rem*. Thus if real property be vested in trustees in trust for A. in fee simple, A.'s equitable right will pass at his death to his heir or devisee; and if personal property be vested in trustees in trust for A. absolutely, A.'s equitable right will pass at his death to his administrator or executor.

It may happen, however, that property may be real property according to the rules of law, but may be personal property according to the rules of equity, or *vice versâ*. This is the result of the equitable doctrine of conversion to which we must refer very briefly.

It is an established principle of equity, "that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, *are to be considered as that species of property into which they are directed to be converted*; and this in whatever manner the direction is given,

(k) Wms. Personal Prop. p. 19, 13th ed.

whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money or money land" (*m*).

For example, if land be conveyed to trustees in trust to sell it and to hold the proceeds of sale in trust for A., and before the land is sold A. dies, his interest will be an interest in personal property and will pass to his personal representatives, for, in consequence of the trust to sell, the land will be treated in equity as converted into money *from the moment the trust was created*. On the other hand, if money had been given to the trustees in trust to invest it in land, and to hold the land in trust for A. in fee simple, A. would immediately have acquired an interest in real property which would have passed to his heir, although the money had not been invested in land at the time of his death.

Again, suppose A. enters into a contract with B. to sell a piece of freehold or copyhold land; the effect of the contract will be to convert the land into personal property from the moment the contract was entered into: accordingly, if A. dies the moment after the contract has been made, the right to receive the purchase-money of the land will pass to his personal representatives. So, on the other hand, if A. contracts to purchase land and dies before the contract has been carried out, it was formerly the law that the money which he had agreed to give for the land was converted into real estate from the moment the contract had been made, and accordingly the real representatives were entitled to have the land conveyed to them, and the personal representatives were bound to pay for it. But by a recent Act (*n*), the real representa-

(*m*) *Fletcher v. Ashburner*, 1 Bro. C. C. 497; 1 Smith's Leading Cases, 899.      (*n*) 40 & 41 Vict. c. 34. See *post*, p. 140.

tive must pay the purchase-money out of his own pocket in case the deceased died since the 31st December, 1877.

We must observe, however, that in these cases equity does not alter the succession to the *legal right in rem* either to the land contracted to be sold, or to the money agreed to be paid for land: the former, like other real property, passes to the real representative, the latter to the personal representatives, but in the former case the personal representatives have an equitable right *in personam* to the purchase-money, while in the latter the real representative has an equitable right *in personam* (1) to have the land conveyed to him, and (2) to have the purchase-money paid by the personal representatives, provided the deceased died before the 1st January, 1878 (o). In case of the death occurring after 31st December, 1881, the personal representatives have power to convey the land to the purchaser, if it be of freehold tenure (p).

### B. *Rights in personam.*

The general rule is that all rights *in personam* pass to the personal representatives.

The only exceptions to this rule seem to be the following :—

#### I. *Rights to the benefit of Covenants which run with the Land or with the Reversion.*

Covenants of this kind are covenants which “touch or concern” land in which the covenantee has an estate in possession or reversion. They are said to “run with” the land or reversion, because every successive owner of the land or reversion has a right to enforce them, or to recover damages for their breach, just as the original covenantee might have done.

They may be entered into between the owner and a person to whom he demises the land (*i.e.*, between lessor and lessee),

(o) 40 & 41 Vict. c. 34.

(p) 44 & 45 Vict. c. 41, s. 4.

or between the owner and some person other than a lessee, *e. g.*, covenants for title between vendor and purchaser.

The old common law rule was that covenants between lessor and lessee “ran with the land but not with the reversion”—that is, they ran with the leasehold interest of the lessee, but did not run with the reversionary interest of the lessor. But this rule has been altered by 32 Hen. VIII. c. 34, in all cases where the lease is under seal; so now all such covenants run with the reversion as well as with the land, *provided the lease is under seal*.

Of course the *lessee's rights* to the benefit of such a covenant pass at his death to his executor or administrator together with the leasehold interest.

Covenants which run with the land or reversion may be divided into two classes—

(1) Covenants which relate to something to be done to the land itself, or to a thing *in esse* parcel of the land: *e. g.*, covenants for quiet enjoyment of the land, or to repair buildings already existing on the land.

Such covenants pass to the heir or devisee although they may not have been named in the covenant, and even where the covenant was expressly made with the covenantee and “his executors and administrators.” “If a man leases for years, and the lessee covenants with the lessor, his executors and administrators, to repair and leave in good repair at the end of the term, and the lessor dies, his heir may have an action upon this covenant; for this is a covenant that runs with the land (*q*) and shall go to the heir though he is not named” (*r*).

(2) Covenants which relate to something not in existence at the time the covenant is entered into, but which, when it does come into existence, will be annexed to the land, *e. g.*, a covenant to build a wall or a house.

(*q*) The *reversion* is evidently intended. (*r*) Bacon's Abr. Covenant (E. 2)

But in order that these covenants may run with the land or reversion, the heirs and assigns of the covenantee must be expressly included in the covenant (*s*) unless the covenant was made on or after January 1st, 1882. As to covenants made on or after that date, the Conveyancing and Law of Property Act, 1881 (*t*), provides (*u*) that they "shall be deemed to be made with the covenantee, *his heirs and assigns*, and shall have effect as if heirs and assigns were expressed."

It must be observed that the mere expression of "heirs and assigns" in a covenant does not make it run with the land or reversion. If the covenant does not "touch or concern" the land itself (*i.e.*, if it does not relate to the land itself or to something annexed or to be annexed to the land), but relates to something which is merely collateral, the real representatives will (subject to the following exception) acquire no right under the covenant, though it purports to be made with the "heirs and assigns" of the covenantee. Thus, a covenant by a lessee to pay a sum of money to the lessor, *his heirs and assigns*, would confer no right on the real representatives, and only the personal representatives could sue on the covenant.

An exception has been introduced by courts of equity in certain cases (*x*) of collateral covenants entered into for the purpose of improving the value, or preventing the depreciation in value of the land of one person by *restraining* an adjoining land owner from using his land in a particular manner, *e.g.*, to restrain him from building a public house on it. Such covenants are merely collateral, for they do not "touch or concern" the land benefited; they merely confer an indirect benefit by means of a restraint placed on the user of *other land*. At common law they did not run with the land to be benefited, and equity does not profess to make

(*s*) But if only heirs were named, the heir would be entitled to the benefit of the covenant.

(*t*) 44 & 45 Vict. c. 41.

(*u*) Sect. 58 (1).

(*x*) See *post*, p. 74.

them so run, but practically gives them that effect by conferring on the heirs and assigns of the covenantee an equitable right to enforce the covenant. "Anybody entitled to have the benefit of the restricting covenant may come to a court of equity to restrain the defendant, not on the ground that he is breaking a covenant which runs with the land, but on the ground that he is dealing with the land inequitably" (y). If, however, the covenantor has assigned his interest in the land, his assignee will not be bound by the covenant *unless he had notice of it*. This subject will be further dealt with when we come to consider the obligations which pass to the heir.

## II. *Rights under Covenants the performance of which would confer a Freehold Interest.*

In addition to covenants running with the land or the reversion, it seems that the benefit of any covenant, the performance of which would confer an interest in freehold property upon the covenantee, will be regarded as a covenant real (z), so that the rights arising under it pass to the heir or devisee of the covenantee. Thus, a covenant by A. to enfeoff B. and his heirs, if not performed during the lifetime of B., would enable the heir of B. to sue A. on the covenant; and so where three coparceners purchased land in fee, and mutually covenanted "for them and their heirs," with "them and every of them and their heirs," that the survivors should convey to the heirs of such as should die first an equal part with such survivors, it was resolved that this was a real covenant, and went to the heir of the covenantee (a).

(y) Per Cotton, L. J., *Fairclough v. Marshall*, 4 Ex. D. 37.

(z) Covenants real are merely covenants which the real repre-

sentatives can enforce.

(a) *Wootton v. Cooke*, Jenk. 241; 1 Wms. Exors. p. 809, 8th ed.

### III. *Rights arising from breaches of Covenants real (i. e., the Covenants contained in I. and II.*

It may happen that a breach of a covenant real has occurred during the lifetime of the deceased, but damages for the breach have not been recovered before his death. In these cases it is sometimes difficult to decide whether the real or the personal representatives have the right to sue for damages for the breach, but the general rules of law on the subject seem to be as follows:—

Where the covenant is of such a kind that damages for breach of it may be recovered from time to time (as in the case of a covenant by a lessee to repair buildings, &c.), the personal representatives, and they alone, will be entitled to sue upon the covenant for damages which have accrued during the lifetime of the covenantee; although it may often be difficult to apportion the damages, *i. e.*, to separate those which accrued *before*, from those which accrued *after*, the death (*b*).

Where the covenant is of such a kind that damages for its breach must be recovered *once for all*, or, in other words, where an action having once been brought upon the breach, and damages recovered, no further action will lie against the covenantor (as in the case of a covenant for title), the rules established by the cases may be thus summarized:—

(1) Where a formal breach has been committed during the lifetime of the deceased, but the ultimate damage resulting from it does not accrue until after the death of the deceased, the heir or devisee alone has the right to sue.

Thus, in *King v. Jones* (*c*), G. and his wife conveyed lands to K., and covenanted that they would do all reasonable acts for the further assurance of K.'s title. At that period it was

(*b*) *Kingdon v. Nottle*, 1 M. & S. 355, 365.

(*c*) 5 Taunt. 418; affirmed, 4 M. & S. 188.

necessary, in addition to the conveyance, that a fine should be levied (*d*), in order to give K. a good title against persons claiming under G.'s wife. The levying of a fine was an act of further assurance to which K. was reasonably entitled under the covenant, and he requested that it might be levied; G. and his wife failed to comply with this request, and thus committed a breach, during the life of K. On K.'s death his heir took possession of the land, but was subsequently ejected by a person claiming under G.'s wife. It was held that the heir of K. was alone entitled to sue on the breach. Heath, J., in delivering the judgment of the Court, said (*e*): "It appears that John King, the ancestor, was a willing purchaser; he paid his purchase-money, relying on the vendor's covenant; he required him to perform it, but gave him time, and did not sue him instantaneously for his neglect, but waited for the event. It was wise so to do until the ultimate damage was sustained; for otherwise he could not have recovered the whole value: the ultimate damage, then, not having been sustained in the time of the ancestor, the action remained to the heir (who represents the ancestor in respect of land, as the executor does in respect of personalty) in preference to the executor."

So, in *Kingdon v. Nottle* (*f*), N. conveyed land to K., and covenanted that he had a good title; it turned out that N. had not a good title, and therefore K. had a right to sue him for breach of covenant; K., however, died without having done so, and his executrix brought an action against N. to recover damages for the breach. It was held that she had no right to sue N. The reason was thus given by Bayley, J. (*g*), "The testator [*i. e.*, K.] might have sued in his lifetime; but having forborne to sue, the covenant real,

(*d*) See, as to a *fine*, Wms. Real Prop. pp. 66, 270, 13th ed.

(*e*) 5 Taunt. at p. 427.

(*f*) 1 M. & S. 355.

(*g*) At p. 365.



and the right to sue thereon, devolved with the estate upon the heir. If this were not so, and the executrix was permitted to take advantage of this breach of covenant, she would be recovering damages to be afterwards distributed as personal assets, for that which is really a damage to the heir alone; and yet such recovery would be a complete bar to any action which the heir might bring." The same judge, however, said, during the argument of the case, "If it had been alleged that the testator was prevented from selling, perhaps the executor might have maintained the action" (*h*).

(2) Where the ultimate damage, *as well as* the breach, has occurred during the lifetime of the deceased, the personal representatives alone are entitled to sue on the breach.

Thus, in *Lucy v. Levington* (*i*), L. covenanted with J. S. to levy a fine and for quiet enjoyment of certain lands. J. S. was evicted from the lands and then died. His executor sued L. on the covenants, and it was held that he was entitled to recover damages for the breach.

#### IV. *Rights arising under simple Contract.*

At common law the rights arising under simple contract pass to the personal representatives alone. "In all cases where the heir has sued, the action has been on a covenant, but he can have no right of action on a mere agreement to sell" (*k*).

But where the contract is for the purchase of real property by the deceased, the heir or devisee will have a right to enforce performance of it in equity (*l*). This occurs in every case where the contract was a *binding* one, as against the other party to the contract, before the death of the deceased contractor.

(*h*) 1 M. & S. at p. 362.

533, 539.

(*i*) Ventris, p. 175.

(*l*) Fry, Specific Performance,

(*k*) *Orme v. Broughton*, 10 Bing. p. 84.

## CHAPTER III.

## THE MANNER IN WHICH THE OBLIGATIONS OF DECEASED PERSONS ARE DIVIDED BETWEEN THEIR REAL AND PERSONAL REPRESENTATIVES.

IN the first place it must be observed that the question which we have to determine is this:—Suppose A. incurs an obligation to B., and dies before he has performed it, can B. enforce the obligation *only* against the real representatives, or *only* against the personal representatives, or can he enforce it against *either* at his own discretion? We shall see later on (*n*) that, in some cases where an obligation has been enforced against one set of representatives, they will be entitled to be reimbursed by the other set, but with these questions of conflicting rights and obligations as between the real and personal representatives themselves, we are not here concerned.

The general rule is, that all obligations of a deceased person pass to and become binding upon his personal representatives *only*; so that they alone can be sued upon such obligations.

To this rule there are the following exceptions:—

I. *Obligations to pay Money charged upon the Real Property of the Deceased.*

For example, the payment of portions to younger children, or an annuity charged upon the real property of the deceased.

Obligations of this kind bind only the real representatives when the obligation is intended to be satisfied entirely out of

the real property (which often happens in cases of merely voluntary charges, such as portions). But where this is not the intention—for instance, where the charge is merely a security for payment of money, or where, in addition to the charge upon the land, there is a covenant for payment—the obligation will bind both real *and* personal representatives.

## II. *Obligations arising under covenants which run with the Land or Reversion.*

When such covenants have been entered into between a *lessor and lessee* the burdens which they impose run with the land or the reversion in the same manner as the benefits they confer. Thus the heir or devisee of the lessor is bound by all covenants which “touch and concern the land demised,” and were entered into by the lessor for the benefit of the lessee; while the administrator or executor of the lessee is bound by all such covenants of the lessee as were entered into by him for the benefit of the lessor. As we have seen (*o*), in order that a covenant may run with the *reversion*, the lease must have been made by deed (*p*), and this applies as well to the burden as to the benefit of a covenant.

But this rule only applies where the parties to the covenant stand in the relation of lessor and lessee. In all other cases, as, for instance, covenants entered into between vendor and purchaser, a covenant which restricts the covenantor’s enjoyment of his land does *not* run with the land *unless the restriction be one of a certain class, known and recognised by the common law as easements and profits* (*q*). The principle upon which the common law courts acted was that “great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying

(*o*) *Supra*, p. 66.

(*p*) 32 Hen. VIII. c. 34.

(*q*) See Anson, *Contracts*, p. 243, 5th ed.; Pollock, *Contracts*, p. 227, 4th ed.

real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands however remote" (r).

An exception to the common law rule has, however, been introduced by the courts of equity in the case of covenants entered into between adjoining landowners for the purpose of restraining one or both of them from using their land in a particular manner, although the restraint creates a kind of easement unknown to the common law, *e.g.*, a covenant not to build a public house on the land. The exception seems only to have been applied in cases where the covenantor purchased his land from or sold it to the covenantee, and entered into the covenant at the time the conveyance was executed; but the principle upon which the exception is founded would seem to be applicable to other cases. This principle is explained in the leading case of *Tulk v. Moxhay* (s). In that case A. had sold land in Leicester Square to B., and B. had covenanted not to use the land for building purposes; A. was the owner of houses in the square; B. sold the land to C., who had *notice* of the restrictive covenant. It was held that the covenant was binding on C., and the law was laid down as follows:—

"It is said that, the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. . . . That the question does not depend upon whether the covenant runs with the land, is evident from this, that if there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing

(r) *Keppell v. Bailey*, 2 My. & K. 517.

(s) 2 Ph. 774.

with notice of that equity can stand in a different situation from the party from whom he purchased." (t).

But this principle only applies to *restrictive covenants*, and not to covenants to do something to the land. In *London and South Western Railway Co. v. Gomm* (u), Jessel, M. R., referring to *Tulk v. Moxhay*, said (x) the case "was very much considered by the Court of Appeal at Westminster in *Haywood v. The Brunswick Permanent Benefit Building Society* (y), and the Court there decided that they would not extend the doctrine of *Tulk v. Moxhay* to *affirmative covenants* compelling a man to lay out money or do any other act of what I may call an active character, but that it was to be confined to *restrictive covenants*. Of course that authority would be binding upon us if we did not agree to it, but I most cordially accede to it."

Constructive notice (z) of the covenant will be sufficient to bind a subsequent purchaser of the land, and an omission on his part to satisfy himself as to the nature of his vendor's title may render him liable for an unconscious breach of the covenant (a).

The result is that *restrictive covenants* of this kind, although they do not run with the land at common law, now have practically the *effect* of covenants running with the land. If, therefore, a man purchases land with notice of a *restrictive covenant* of this kind, and dies, the covenant will be binding upon his heir or devisee; so, if a man enters into a covenant of this kind at the time of purchasing land, and dies, the covenant will be binding upon his heir or devisee.

(t) *Tulk v. Moxhay*, 2 Ph. 774, at p. 777.

(u) 20 Ch. D. 563.

(x) At p. 582.

(y) 8 Q. B. D. 403.

(z) *I. e.*, where a man has the opportunity of inspecting the deed

containing the covenant, he will be held to have had notice of it, although, as a fact, he has not read it.

(a) Dart, V. & P., vol. ii. p. 769, 5th ed.

### III. *Obligations arising from certain other Contracts under Seal.*

In addition to the cases just mentioned of covenants running with the land or reversion, the *heir* of the deceased was always liable, to the extent of the *freehold* property to which he had succeeded, to pay any debt or fulfil any contract, in case the deceased had by any deed or writing under seal expressly bound his *heirs* as well as himself to pay the debt or fulfil the contract (a); but the heir was not liable in case he only succeeded to *copyhold* property. But until the reign of William and Mary the *devisee* was not bound by the deed of the deceased, although such deed would have bound the heirs. In that reign, however, an Act was passed which made the devisee also liable in cases where the deceased had bound his heirs by deed (b).

It will be observed that the real representatives were not bound unless the deceased person had expressly made the deed binding on his heirs. But by the Conveyancing and Law of Property Act, 1881, it is now provided that in the case of contracts under seal entered into on or after January 1st, 1882, such contracts, though *not expressed to bind the heir*, shall operate in law to bind the heirs and real estate, as well as the executors and personal estate, of the person making the same as if heirs had been expressed (c).

The heir or devisee may be sued personally (d) for debts payable under deeds in which the heir is expressly bound, or, if the deed be executed on or after January 1st, 1882, under *any contract under seal*, and judgment given against him to the extent of the real property to which he has succeeded.

(a) Wms. Real Prop. p. 100, 16th ed.

(b) 3 & 4 Will. & M. c. 14, s. 2, made perpetual, 6 & 7 Will. III. c. 14, repealed, but only for the purpose of consolidating and

amending its provisions, by 11 Geo. IV. & 1 Will. IV. c. 47.

(c) 44 & 45 Vict. c. 41, s. 59.

(d) 11 Geo. IV. & 1 Will. IV. c. 47, ss. 6 and 8.

Where the heir or devisee is not bound by deed, he is only liable for debts after the personal estate has been exhausted and has proved insufficient to satisfy them, and this is the only case where he is liable, whether the debt be payable under a deed or not, if the property be *copyhold* (e).

Contracts under seal which bind the real representatives are equally binding upon the personal representatives, so that in these cases either set of representatives may be sued on the contract at the discretion of the party entitled to enforce it.

#### IV. *Obligations arising under Simple Contracts for the Sale of Real Property.*

Where the owner of real property has entered into a contract to sell, and dies before the contract has been completed, the real representatives of the deceased owner will be under an equitable obligation to convey the land to the purchaser, provided at least the contract was one which could have been enforced against the deceased had he lived (f).

This is the only kind of obligation arising from simple contract which will bind the real representatives, except under the circumstances mentioned in Exception VII., *post*.

#### V. *Obligations arising from judgments, decrees, or orders of a Court.*

1. Where a judgment, order, or decree, has been obtained, in an action respecting real property, against the owner of the property during his lifetime, it will be binding upon his heir or devisee after his death. And if such an action be depending at the time of his death, his heir or devisee will be bound by the result (g).

2. Where judgment has been obtained by a creditor against a debtor, and the debtor dies before he has satisfied

(e) See *post*, p. 79.

(f) Fry, *Specific Performance*, p. 84; see *supra*, p. 65, as to the power of the personal representa-

tives to convey freehold property.

(g) Wms. *Real Prop.* p. 113, 16th ed.

the judgment debt, his real property which has passed to his heir or devisee may be taken in execution by the creditor so long as it remains the property of the heir or devisee. But if (before it has been taken in execution) the heir or devisee sell or mortgage it, he will not be liable for the debt (except in the case mentioned in Exception VII., *post*); and, by a number of statutes of the present reign (*h*), the purchaser, if a *bonâ fide* purchaser for value, or mortgagee, will in most cases be protected from liability in respect of the debt.

Copyhold lands were not liable to be taken in execution for judgment debts until 1838 (*i*).

The judgment creditor may also enforce his judgment against the personal representatives.

#### VI. *Obligations to pay Crown debts.*

Debts due, or which might have become due, to the Crown from persons who were accountants to the Crown, and debts of record, or by bond or specialty due from other persons to the Crown, are binding upon the freehold property of such debtors which has passed to their heirs or devisees (*k*). But if the heir or devisee sell or mortgage the property, he will not be liable to pay the debt (except in the case mentioned in the next exception); and, by a number of statutes of the present reign (*l*), the purchaser, if a *bonâ fide* purchaser for valuable consideration, or mortgagee, will in most cases be protected against any liability in respect of the debt.

The personal representatives are also liable to pay these debts.

(*h*) 1 & 2 Vict. c. 110; 3 & 4 16th ed.

Vict. c. 82, s. 2; 18 & 19 Vict. c. 15, ss. 4, 5; 23 & 24 Vict. c. 38, s. 1; 27 & 28 Vict. c. 112, s. 1. See Wms. Real Prop. pp. 106—108, 16th ed.

(*i*) 1 & 2 Vict. c. 110, s. 11.

(*k*) Wms. Real Prop. p. 111,

(*l*) 12 & 13 Vict. c. 89; 2 & 3 Vict. c. 11, ss. 8, 10; 16 & 17 Vict. c. 107, ss. 195—197; 22 & 23 Vict. c. 35, s. 22; 23 & 24 Vict. c. 115, s. 1; 28 & 29 Vict. c. 104, s. 4. See Wms. Real Prop. pp. 111—112, 16th ed.



VII. *Obligations to pay simple contract and other general debts which remain unpaid after the personal estate has been exhausted.*

The heir or devisee is under no liability in respect of the debts of the deceased (except in the cases and to the extent already mentioned in Exceptions III., V., and VI., *supra*), unless the personal estate prove insufficient to satisfy them. In this event he is liable to pay the debts which remain unpaid, but his liability is limited to the *value* of the real property which has passed to him. If he has sold or otherwise disposed of the real property or any part, he still remains liable to the creditors for the value of such property.

Even this contingent liability of the real representatives for the general debts of the deceased has only been introduced by quite recent legislation. Before 1807 they were not under any circumstances liable for simple contract debts, and, as we have seen (*m*), were only liable for specialty debts where the heir was expressly bound by the deed. In that year the heirs or devisees of deceased *traders* were made liable for simple contract debts and specialty debts where the heir was not expressly bound (*n*) (provided the property was freehold); but it was not until 1833 (*o*), that the heirs or devisees of all persons, whether traders or not, were made liable for such debts. This Act applied to customary and copyhold as well as freehold property.

But in order to obtain payment from the real representatives, the creditor must get the estate administered in the Chancery Division of the High Court (*p*): *i. e.* he cannot sue the heir or devisee and get judgment for his debt so as to gain a priority over other creditors; he must bring an action for the administration of the estate by the Court; and all other creditors will be entitled to prove their claims, and share equally in proportion to the amount of their claims in case there be not sufficient to satisfy their claims in full.

(*m*) *Supra*, p. 76.

(*n*) 47 Geo. III. c. 74.

(*o*) 3 & 4 Will. IV. c. 104.

(*p*) The County Courts have jurisdiction where the whole estate

(both real and personal) does not exceed 500*l.* in value. 51 & 52 Vict. c. 43, s. 67, 1. This Act consolidates the former Acts on the subject.

## PART III.

## THE LAW OF INTESTATE SUCCESSION.



WHEN a person dies intestate—that is, when he dies without having made a will at all, or where he has made a will which turns out to be invalid, and so fails to take effect—his *heir-at-law* will be his real representative, and will accordingly succeed to all his real estate, and to the obligations which we have seen are binding upon real representatives; an *administrator*, who will be appointed by the Probate Division of the High Court of Justice, will be his personal representative, and so will succeed to all his personal estate, and to the obligations which bind personal representatives. Accordingly, the subject of intestate succession is divisible into two main branches—(1) the succession of the heir, and (2) the succession of the administrator. We will, in the first place, deal with each branch separately, and will then discuss shortly certain important rights and obligations of the heir and administrator *inter se* which are the consequence of the deceased's estate being divided between two successors whose interests are conflicting. And afterwards we must explain how the succession to rights and obligations which were vested in or binding on a deceased person in his capacity of executor, administrator, or trustee, differs from the succession to his own rights and obligations.

Accordingly we will divide the subject of intestate succession as follows :—

1. The succession of the administrator.
2. The succession of the heir.
3. Rights and obligations of the heir and administrator *inter se*.
4. The succession to deceased executors, administrators, and trustees.

## CHAPTER I.

## THE SUCCESSION OF THE ADMINISTRATOR.

THE succession of the administrator will be dealt with under the following heads :—

1. The different kinds of administrators.
  2. The persons who are entitled to be appointed administrators.
  3. The appointment of the administrator.
  4. The rights and obligations of the administrator.
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SECTION I.—*The different kinds of Administrators.*

Administrators may be divided into two chief classes :— (1) those appointed to administer the estate of a person who dies *testate*, and (2) those appointed to administer the estate of a person who dies *intestate*.

The former class are called administrators *cum testamento annexo*. They are appointed by the Probate Division of the High Court in certain cases where, from some cause or other, there is no executor to administer the testator's estate, and they are bound, like executors, to administer the estate in accordance with the directions contained in the will. In fact they seem to differ from executors merely in the manner of their appointment—they are appointed by the Court, executors by the testator. At present, therefore, we are not further concerned with them.

Administrators appointed to administer the estate of an intestate may also be divided into two classes.

1. Administrators who are appointed to administer the whole personal estate of the intestate without any restriction

as to the time during which they are to act. When the term "administrators" is used without any qualifying words, administrators of this class are always intended.

2. Special administrators, that is, administrators appointed either to administer only a *certain portion* of the personal estate, or else to administer the whole personal estate during only a *specified time*.

They are appointed in the following cases:—

(1) Where a person has died partly testate and partly intestate.

(2) Where an administrator dies before he has fully administered the estate. In this case a special administrator is appointed to complete the administration, and is called an administrator *de bonis non administratis*, or shortly *de bonis non*.

(3) Where the person entitled to be appointed administrator is under the age of twenty-one, a special administrator may be appointed to act during the minority, and is on that account called an administrator *durante minore etate*.

(4) Where a law suit, brought to determine some question relating to the succession, is pending, a special administrator may be appointed to administer the whole or some part of the estate until the dispute is settled; he is therefore called an administrator *pendente lite*.

(5) Where the person entitled to be appointed administrator is out of the realm, a special administrator may be appointed to act during his absence, and is therefore called an administrator *durante absentia*.

(6) Where it may be necessary to appoint a person other than the administrator to carry out some specific object, as to bring an action to recover certain property of the intestate, a special administrator may be appointed for the purpose.

(7) Where the administrator duly appointed is incapable of legal acts, as where he is a lunatic, a special administrator may be appointed to act during such incapacity.

Subject to these limitations or restrictions, the legal position of special administrators is the same as that of administrators.

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SECTION II.—*The Persons entitled to be appointed Administrators.*

We have seen (a) that it is provided by the Statute 31 Edw. III., st. 1, c. 11, that “the ordinaries shall depute of the *next and most lawful friends* of the dead person intestate to administer his goods.” A statute of the reign of Henry VIII. (b) provides that the ordinary shall grant administration “to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good”; and that, “where divers persons claim the administration as next of kin, which be equal in degree of kindred to the . . . person deceased, and where any person only desireth the administration as next of kin, when indeed divers persons be in equality of kindred as is aforesaid, that in every such case the ordinary to be at his election and liberty to accept any one or more making request when divers do require the administration” (c).

The “next and most lawful friends,” and “the next of kin,” have been defined as “the next of blood who are not attainted of treason, felony, or have any other lawful disability” (d). Infants, lunatics and idiots, and bankrupts, cannot be appointed (e).

Blood relationship, or consanguinity, has been defined as “*vinculum personarum ab eodem stipite descendantium*” (f), i.e., the relationship of persons who are descended from the same common ancestor. It is thus opposed to relationship through

(a) *Supra*, p. 17.

(b) 21 Hen. VIII. c. 5, s. 3.

(c) *Ibid.*

(d) *Hensloe's Case*, 8 Rep. 39.

(e) 1 Wms. Exors. p. 455, 8th ed.

(f) 2 Bl. Com. p. 203.

marriage. If A. has two sons, B. and C., and C. marries D., D. cannot be next of kin of her brother-in-law B., as they are not descended from a common ancestor; but children of the marriage may be next of kin of their uncle B., for A. is the common ancestor of both B. and the children of C.

Consanguinity may be *lineal* or *collateral*.

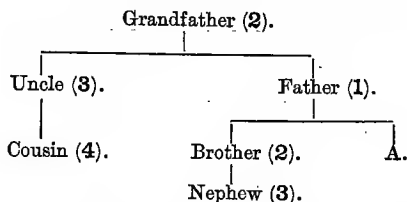
Lineal consanguinity is the relationship between *ascendants* and *descendants*, as between son and father, grandson and grandfather, great-grandson and great-grandfather, &c.

Collateral consanguinity is the relationship *between descendants of a common ancestor*, as between uncle and nephew, first cousins, second cousins, &c.

In ascertaining which degree of kindred is nearest or "next" to the deceased person, the ordinaries followed the civil law method of calculation; and as no alteration in this respect was made when the jurisdiction of the ordinaries was transferred to the Court of Probate, this mode of calculation is still the law. The practice is to count upwards, from the deceased person to the common ancestor, and then downwards from the common ancestor to the person claiming as next of kin, reckoning a degree for each person through whom relationship is claimed both in the ascending and descending line.

For instance, suppose A. dies intestate, and his only relations are a nephew and a cousin; in order to find out whether the nephew or cousin is the next of kin to A., we must commence with A. and reckon one degree in the ascending line to A.'s father, who is the common ancestor, a second degree in the descending line to A.'s brother, and a third degree to A.'s nephew; thus we find the nephew is related to A. in the third degree. In the case of the cousin, we must reckon in the ascending line one degree to A.'s father and a second degree to A.'s grandfather (the common ancestor), and, in the descending line, a third degree to A.'s uncle, and a fourth degree to A.'s cousin; thus we find the

cousin is related to A. in the fourth degree, and consequently the nephew, and not the cousin, is A.'s next of kin.



It would appear from the statutes above referred to (*g*), that the ordinary was bound to grant administration either to the widow or to one or more of the persons who were ascertained to be the next of kin according to the rule of computation just explained. As a general rule this was the case, but to this general rule certain exceptions were introduced by the establishment of the principle that *the grant of administration ought to follow the beneficial interest in the estate*. This principle appears to have been derived from the construction put upon the statutes just referred to (*h*), by both the common law and Ecclesiastical Courts (*i*). Its effect seems to be (*k*) that, as a general rule, only those persons are entitled to administration who are also entitled under the Statutes of Distribution to a share in the residue of the estate after payment of debts (*l*).

The general rule, therefore, that the next of kin (*i. e.* the persons in the nearest degree of kindred) are entitled to administration, is subject to the following exceptions:—

(1) The children of the deceased intestate and their descendants to the remotest degree are preferred to his parents (*m*), although both parents and children being in the first degree are equally his next of kin, and parents are obviously in a nearer degree than grandchildren.

(*g*) *Supra*, p. 83.

(*k*) *Ibid.* p. 424.

(*h*) *Ibid.*

(*l*) See *post*, p. 108.

(*i*) 1 Wms. Exors. pp. 424, 442, 8th ed.

(*m*) 1 Wms. Exors. p. 430; 2 Bl. Com. p. 504.

(2) Grandchildren of the deceased by a child who died in the lifetime of the deceased, are entitled equally with children, although children are in the first and grandchildren in the second degree.

(3) The brothers and sisters of the deceased intestate (but not their descendants), are preferred to his grandfather and grandmother (*n*), although both classes being in the second degree are equally his next of kin.

(4) Where the father of the deceased intestate pre-deceased him, the brothers and sisters of the deceased intestate are equally entitled with their mother, although they are in the second and she in the first degree.

We shall see presently (*o*), that in all these cases the persons entitled to administration are entitled to the residue of the estate of the deceased, in preference to other relations.

(5) In case the deceased was a married woman, her next of kin are entirely excluded, and administration is granted to her husband.

“The foundation of this claim has been variously stated. By some it is said to be derived from the Statute of 31 Edw. III. (*p*), on the ground of the husband’s being ‘the next and most lawful friend’ of his wife; while there are other authorities, which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes. But the right, however founded; is now unquestionable, and is expressly confirmed by the statute 29 Car. II. c. 3” (*q*).

The order, therefore, in which (as a general rule) a man’s relations are entitled to administration, is as follows:—

#### I. Descendants.

1. Children, and grandchildren by a deceased child.
2. Grandchildren.
3. Great-grandchildren, &c.

(*n*) 1 Wms. Exors. p. 430, 8th ed.

(*o*) *Post*, pp. 108, *et seq.*

(*p*) *Supra*, p. 83.

(*q*) 1 Wms. Exors. p. 416, 8th ed. See, as to 29 Car. II. c. 3, *post*, p. 118.



## II. Ascendants and collaterals.

1. The father.
2. The mother, brothers and sisters.
3. Paternal and maternal grandfather and grandmother.
4. All paternal and maternal ascendants and collaterals in the *third degree*, *i. e.* great-grandfather and mother, uncles, aunts, nephews and nieces.
5. All paternal and maternal ascendants and collaterals in the *fourth degree*, *i. e.* great great-grandfather and mother, great uncles and aunts, cousins german.
6. All paternal and maternal ascendants and collaterals in the *fifth degree*, *e. g.* great great uncle.

And so on, in case there are any relations in a more remote degree.

In case the intestate leaves a widow, she will have the same right to a grant of administration as the relations in *any* of the classes above enumerated—in fact the Court generally gives her claim the preference.

In the Table of Kindred given upon the following page the numbers indicate the degrees in which the different relations stand to the intestate. It will be observed that the Table includes only the chief classes of relations.

## TABLE OF KINDRED.

## PATERNAL LINE.

4  
Great great grandfather — Great great grandmother.  
5  
— Great great uncle.  
5  
— Great great aunt.

3  
Great grandfather — Great grandmother.  
4  
Great uncle — Great uncle.  
4  
Great aunt — Great aunt.

2  
Grandfather — Grandmother.

3  
Uncle.  
4  
Cousin.  
3  
Aunt.  
4  
Cousin.  
2  
Stepmother — FATHER  
2  
— Half-brother.  
2  
— Half-sister.

2  
Younger brother.  
3  
Nephew.  
2  
Elder brother.  
3  
Niece.

2  
Elder sister.  
3  
Nephew.

2  
Younger sister.  
3  
Niece.

2  
Half-brother.  
2  
Half-sister.

3  
Uncle.  
4  
Cousin.

3  
Aunt.  
4  
Cousin.

## MATERNAL LINE.

4  
Great great grandfather — Great great grandmother.  
5  
— Great great uncle.  
5  
— Great great aunt.

3  
Great grandfather — Great grandmother.  
4  
Great uncle — Great uncle.  
4  
Great aunt — Great aunt.

2  
Grandfather — Grandmother.

1  
MOTHER — STEPFATHER.

3  
Uncle.  
4  
Cousin.

3  
Aunt.  
4  
Cousin.

1  
Elder son.  
2  
Grandson.  
3  
Great granddaughter.  
1  
Younger son.  
2  
Granddaughter.  
3  
Great grandson.  
1  
Elder daughter.  
2  
Granddaughter.  
3  
Great grandson.  
1  
Younger daughter.  
2  
Grandson.  
3  
Great granddaughter.

The class entitled to administration may consist of several persons, or if it includes only one person the deceased may have left a widow, in such cases the ordinary formerly was, and the Probate Division now is (*r*), at liberty to exercise its own discretion in selecting the administrator. This discretion, however, is not to be "arbitrarily or capriciously assumed, but to be a legal discretion governed by principle and sanctioned by practice. In exercising it the Court is not to be guided by the wishes or feelings of parties, but is to look to the benefit of the estate, and to that of all the persons interested in the distribution of the estate" (*s*).

The chief principles and rules by which the Court is guided may be summarized as follows:—

1. Persons who have an interest in the estate are preferred to those who have none (*t*).

This is simply a further application of the principle that the grant of administration ought to follow the beneficial interest in the estate. We have already seen that the application of that principle caused the division of a man's relations into certain classes; it is here further applied in selecting the particular person to whom the grant should be made, out of the class entitled to administration. If, for instance, the class consists of three children, A., B., and C., and X. the widow, and A. and B. have released their interest in the estate, and X. has, by her marriage settlement, been deprived of all interest in the estate, the grant of administration will be made to C. in preference to either A., B., or X.

2. The administration ought to be granted to the person whom the Court deems best qualified to administer the estate in the manner most advantageous to the persons interested therein (*u*).

(*r*) *Supra*, p. 19.

(*t*) 1 Wms. Exors. p. 442, 8th ed.

(*s*) *Warwick v. Greville*, 1 Phillim.  
123, 125.

(*u*) *Warwick v. Greville*, 1 Phillim.  
123, 124.

Thus, a business man will be preferred to a person who is unacquainted with business matters.

3. Where all the members of the class have beneficial interests, and there is no material objection to any of them, nor any special reason for preferring one to the others, the Court will generally grant administration to the one with whom the majority of the parties interested are desirous of entrusting the estate (*x*), subject to the following exceptions:

(1) The widow is usually preferred to the next of kin (*y*).

(2) Relations of the whole blood are preferred to those of the half-blood (*z*).

(3) A son is preferred to a daughter (*a*).

(4) Primogeniture gives no right to a grant of administration, but in cases where the claims of several persons are exactly equal, so that there is no reason why the Court should prefer one to the others, primogeniture will turn the balance in favour of the eldest (*b*).

We have seen that the Court may grant administration to two or more persons, but it always prefers a sole administrator (*c*).

The Court of Probate Act, 1857 (*d*), has considerably enlarged the discretionary power of the Court in the appointment of administrators, by providing that, if it shall appear to the Court to be necessary or convenient "by reason of the insolvency of the estate of the deceased or other special reasons" to appoint a person as administrator, other than the person who would have been entitled to the administration if the Act had not been passed, the Court may appoint such other person to the exclusion of the person who would have been so entitled.

(*x*) 1 Wms. Exors. p. 432, 8th ed.

(*y*) *Ibid.* p. 423, 8th ed.

(*z*) *Mercer v. Morland*, 2 Lee, 499; *Stratton v. Linton*, 31 L. J. (P. M. & A.) 48.

(*a*) 1 Wms. Exors. p. 433, 8th ed.

(*b*) *Warwick v. Greville*, 1 Phillim.

123, 125.

(*c*) 1 Wms. Exors. p. 423, 8th ed.

(*d*) 20 & 21 Vict. c. 77, s. 73.

In case none of the next of kin take out administration, it may, by custom, be granted to a creditor of the deceased intestate, upon the ground that, until administration is taken out, the creditor cannot obtain payment of his debt (*e*). But administration cannot be granted to creditors of a deceased seaman or mariner (*f*).

In case a person dies intestate without leaving a husband or widow or any kindred, the Crown becomes entitled to the whole of his or her property, subject to the payment of the debts, &c.; and by Statute 15 Vict. c. 3, the solicitor of the Treasury is now entitled to administration as nominee of the Crown. Formerly, it seems, the ordinary might have seized the personal estate and disposed of it *in pios usus* (*g*).

In case there be no next of kin, and no creditor, who is willing to take out administration, the Court may grant administration to any person at its discretion; but it seems that it is usual in these cases for the Court merely to grant "letters *ad colligendum bona defuncti*," *i. e.* to gather in the goods of the deceased and to keep them safely to abide the direction of the Court (*h*). The person to whom this grant is made is not an administrator, he is merely the agent of the Court, and accordingly does not *succeed* to the rights of the deceased.

### *Special administrators.*

The general rule is that the administration statutes (*i*) do not apply to special administrations, and therefore the Court is free to use its own discretion in selecting special administrators, though, as a general rule, it will exercise this discretion in accordance with the principles already laid down (*j*).

(*e*) 1 Wms. Exors. p. 446, 8th ed.

(*h*) 1 Wms. Exors. p. 451, 8th ed.

(*f*) 11 Geo. IV. & 1 Will. IV.

(*i*) 31 Edw. III. c. 11, and

c. 20, s. 64.

21 Hen. VIII. c. 5.

(*g*) 2 Bl. Com. p. 505.

(*j*) *Supra*, pp. 85 *et seq.*

To this general rule there is the following exception.

The administration statutes do apply to administrations *de bonis non* to this extent, that if any persons, *who were next of kin of the intestate at the time of his death*, are living at the death of the administrator, they will be entitled under the administration statutes to a grant of administration *de bonis non* in preference to the representatives of the deceased administrator, and to the representatives of any other persons who were next of kin of the intestate at the death of the intestate (*k*).

A recent statute (*l*) has provided that, where general administration has been granted, and twelve months after the death of the intestate the administrator is residing out of the jurisdiction of the Court, the Court may grant special administration to any of the next of kin, or to any creditor, who has made an affidavit that he has a claim against the estate, such administration being limited to the satisfaction of such claim.

It must be observed that where a person, domiciled (*m*) in a foreign country, or in any part of the Queen's dominions out of England, dies intestate leaving personal estate in England, administration must be taken out in England as well as in the country of domicile. In such cases the rule seems to be, that if the person applying for administration has already obtained a grant in the proper court of the country of domicile, the Probate Division will grant administration to such person, *i. e.*, it will follow the grant of the foreign court; but if an original administration be applied for in England, then, whether the deceased be a British

(*k*) 1 Wms. Exors. p. 481, 8th ed.

(*l*) 21 & 22 Vict. c. 95, s. 18.

(*m*) A person's domicile is the place where he makes his home, but, if it does not appear that he has made any particular place his

home, then the country where he was born, or which was the domicile of his parents, will be his domicile. (Foote, Private Int. Juris. p. 9; 2 Wms. Exors. p. 1523, 8th ed.)

subject or an alien, since in either event the distribution of his personal property must be regulated according to the law of his domicile at the time of his death (*n*), it appears to be a necessary consequence that the grant should be made to the person entitled to the personal estate according to the law of such domicile (*o*).

It has been provided by a recent Act (*p*), that when a subject of a foreign state shall die within her Majesty's dominions, and there shall be no person present at the time of such death who shall be lawfully entitled to administer the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign state to take possession, and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, &c., shall immediately apply for, and shall be entitled to obtain from the proper court, letters of administration of the effects of such deceased person, limited in such manner and for such time as to such court shall seem fit (*q*); but this Act only applies to the subjects of those foreign states with whom a convention may have been made by her Majesty, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the like powers and authorities (*q*).

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### SECTION III.—*The Appointment of the Administrator.*

Formerly the Ecclesiastical Courts had exclusive jurisdiction respecting grants of letters of administration, and, as a general rule, the person wishing to be appointed administrator must have applied to the court of the ordinary of the place wherein the deceased dwelt (*i. e.*, the bishop of the diocese,

(*n*) See *post*, p. 119.

(*p*) 24 & 25 Vict. c. 121.

(*o*) 1 Wms. Exors. p. 436, 8th ed.

(*q*) Sect. 4.

or, if the place were within a Peculiar (*r*), the special ordinary of the Peculiar), who alone had authority to make the grant. But if the deceased at the time of his death had effects to the value of one hundred shillings (called *bona notabilia*) within some other diocese or peculiar than that in which he died, the grant of administration must have been made by the archbishop of the province by way of special prerogative, whence the Courts of the Archbishops, in which such grants were made, were called the Prerogative Courts of Canterbury and York. Again, if the deceased left *bona notabilia* in two dioceses of one province, and in two of the other, a grant must have been made by the Prerogative Court of each province; or if he left *bona notabilia* in two dioceses of the Province of York, and in one diocese of that of Canterbury (or *vice versâ*), a grant must have been made by the Prerogative Court of York, and by that of the ordinary of the diocese in the Province of Canterbury (or *vice versâ*) (*s*).

These distinctions were, however, abolished by the Court of Probate Act, 1857 (*t*), whereby, as we have seen (*u*), the jurisdiction of the Ecclesiastical Courts in matters of wills and administrations was transferred to the Court of Probate, and thenceforth a grant of administration has comprised all the personal estate of the deceased, no matter in how many different parts of the country it may have been at the time of the owner's death.

As we have also seen (*x*), the jurisdiction of the Court of Probate was, by the Judicature Act, 1873 (*y*), assigned and is now vested in the Probate, Divorce, and Admiralty Division of the High Court of Justice, usually called for the sake of

(*r*) *I. e.*, certain districts which are exempt from the jurisdiction of the ordinary of the diocese are called Peculiars.

(*s*) 1 Wms. Exors. pp. 292 *et*

*seq.*, 8th ed.

(*t*) 20 & 21 Vict. c. 77, s. 4.

(*u*) *Supra*, p. 19.

(*x*) *Ibid.*

(*y*) 36 & 37 Vict. c. 66, ss. 3, 34.



brevity, in matters relating to wills and administrations, "the Probate Division."

Application for a grant of administration may be made, *in all cases*, to the Principal Registry of the Probate Division (z) at Somerset House, London; but in case the intestate had a fixed place of abode within the district of one of the District Registries which have been established in different parts of the country, the application *may* be made to the Registry of such district (a).

The person applying for a grant of administration is, in the first place, required to pay a certain duty (b) and to make an affidavit in the following form:—

In the High Court of Justice.

Probate, Divorce, and Admiralty Division (Probate).

The Principal Registry,

In the goods of A. B., deceased.

I, C. D., of , in the county of , make oath and say [or solemnly, sincerely, and truly declare and affirm, *according to the form of words prescribed by the statute applicable to the particular case*] that A. B., late of , deceased, died intestate, a bachelor, without parent, brother or sister, uncle or aunt, nephew or niece [or as the case may be], and that I am the lawful cousin-german [or as the case may be]; that I will faithfully administer the personal estate and effects of the said deceased, by paying his just debts and distributing the residue of his said estate and effects according to law; that I will exhibit a true and perfect inventory of all and singular the said estate and effects and render a just and true account thereof, whenever required by law so to do; that the said deceased died at , on the day of , 18 ; and that the whole of the personal estate and effects of the said deceased does not amount in value to the sum of pounds, to the best of my knowledge, information, and belief.

(Signed) C. D.

Sworn at , on the day of , 18 .

Before me, X. Y.

(Person authorized to administer oaths under the Act.)

He is also required to enter into a bond called the administration bond.

(z) 20 & 21 Vict. c. 77, s. 59. (b) See Appendix.  
(a) Sect. 46.

By a statute of the reign of Henry VIII. (b) the ordinaries were directed "to take surety of him or them" to whom administration was granted; and by 22 & 23 Car. II. c. 10, s. 1, it was provided that they should "take sufficient bonds, with two or more able sureties" of the administrator that he would duly administer the estate. These provisions as to security were repealed by the Court of Probate Act, 1857 (c), which provides (d) that "every person to whom any grant of administration shall be committed shall give bond to the judge of the Court of Probate to enure for the benefit of the judge for the time being, and, if the Court of Probate, or (in the case of a grant from a district registrar) the district registrar, shall require, with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct; provided, that it shall not be necessary for the solicitor for the affairs of the Treasury, or the solicitor of the Duchy of Lancaster, applying for or obtaining administration to the use and benefit of her Majesty to give any such bond as aforesaid." In the absence of any special direction that it shall be of *less* amount, the penalty of the bond is double the amount under which the estate and effects are sworn (e).

The grant of letters of administration is made in the following form:—

In Her Majesty's High Court of Justice.

Be it known that at the date hereunder written, letters of administration of the personal estate of A. B., late of \_\_\_\_\_, deceased, who died on \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, intestate, were granted by her Majesty's High Court of Justice at the Principal Registry of the Probate Division thereof, to C. D., the lawful widow and relict [*or as the case may*

(b) 21 Hen. VIII. c. 5, s. 3.

(d) Sect. 81.

(c) 20 & 21 Vict. c. 77, s. 80.

(e) Sect. 82.

be] of the said intestate, she having been first sworn well and faithfully to administer the same.

Dated the            day of            .

(Signed)    E. F.,  
Registrar.

Special administration is obtained in the same manner, except that the grant specifies that the administration is granted for a certain time, or is to relate only to a certain portion of the personal estate, as the case may be, and the affidavit and grant will be modified so as to be in accordance with the facts of the case. Thus, in the case of administration *de bonis non*, the grant is made "of the personal estate of A. B., late of            , in the county of            , deceased, who died on the            day of            , 18    , at            , intestate, left unadministered by C. D.," &c.

Some special provisions have been made by various statutes in cases where the deceased intestate was a seaman or marine, or a soldier. By 11 Geo. IV. & 1 Will. IV. c. 20, s. 56, the wages, prize-money, &c., of a petty officer, seaman, non-commissioned officer of marines, or marine, who dies intestate are to be paid to his representatives only upon administration being obtained in the manner prescribed in that Act, and the Act makes some special regulations with respect to the granting of administration in such cases; the object being to prevent fraud; and where a sum not exceeding 50*l.* is due to the deceased in respect of prize-money or pensions, 11 Geo. IV. & 1 Will. IV. c. 41, provides that such sum may be paid to the representatives of the deceased, although no administration has been obtained by them. Where the deceased was a soldier, prize-money due to him, not exceeding 50*l.*, is, by 3 & 4 Will. IV. c. 53, s. 25, made payable to his representatives without administration being obtained, and by sect. 26 a similar provision is made in the case of foreigners in the pay of the English Crown; and 36 & 37 Vict. c. 57,

s. 15, makes grant of administration unnecessary before payment of the residue of the estates of officers and soldiers to their representatives, in case such residue does not exceed 100%.

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#### SECTION IV.—*The Rights and Obligations of the Administrator.*

The rights and obligations of the administrator may be conveniently discussed under two heads—(A) Rights and obligations vested in or binding upon the administrator by reason of his being regarded by law as the *representative* of the intestate; and (B) rights and obligations vested in or binding upon the administrator by reason of his being regarded by law as a trustee of the personal estate of the intestate for the benefit of the creditors and next of kin of the intestate.

##### *A. Rights and Obligations of the Administrator as Representative of the Intestate.*

The Court of Probate Act, 1858, provides (e) that “from and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the judge of the Court of Probate for the time being, *in the same manner and to the same extent as heretofore they vested in the ordinary.*” We have seen (f), that only the goods and chattels which were in the possession of the deceased at his death vested in the ordinary: all *choses in action* were, and still seem to be, in abeyance until the appointment of an administrator. The jurisdiction of the Court of Probate has been transferred to the Probate Division of the High Court, and such personal

(e) 21 & 22 Vict. c. 95, s. 19.

(f) *Supra*, p. 18.

estate as formerly vested in the judge of the Court of Probate probably now vests in the President of the Probate Division (*g*). After 31 Edw. III. st. 1, c. 11, the ordinary had no jurisdiction to administer the estate himself, he merely had the power of appointing an administrator; he did not, therefore, succeed to the rights of the deceased over the goods and chattels, but seems rather to have occupied the position of a guardian or custodian of them until such time as letters of administration could be granted; and this seems to be the position of the President of the Probate Division, or other judge in whom the property now vests (*h*).

But, although the rights of the intestate do not vest in the administrator until the grant of administration, yet, for some particular purposes, the grant is deemed to relate back to the death of the intestate, so as to enable the administrator to bring actions in respect of, or otherwise to acquire the benefit of, transactions relating to the personal estate which may have occurred between the date of the death and that of the grant of administration (*i*). Thus, the administrator may bring an action against a person who has taken possession of and carried away the goods of the intestate after the death, although he has restored them and ceased to hold them before the grant of administration, so that there would have been no ground of action if the grant had not related back to the death of the intestate (*k*); so he may sue on a contract made by a person on behalf of the estate during the interval between the death and the grant of administration (*l*).

Upon letters of administration being granted, all the rights which constitute the *personal estate* (*m*) of the deceased become

(*g*) 36 & 37 Vict. c. 66, ss. 16, 34.

(*i*) 1 Wms. Exors. p. 638, 8th ed.

(*h*) There seems some doubt as to the judge of the High Court in whom the property vests. See Wms. Personal Prop. p. 463, 13th ed.

(*k*) *Foster v. Bates*, 12 M. & W. 226.

(*l*) *Bodger v. Arch*, 10 Ex. 333.

(*m*) See *supra*, Pt. II., Chap. II.

vested in the administrator, and all the obligations which bind the personal representatives (*n*) of the deceased become binding upon the administrator. To the extent of these rights and obligations the administrator becomes clothed with the legal *persona* of the deceased, or, in the language of English law, becomes the *representative* of the deceased.

Accordingly, as a general rule the administrator has the same power of dealing with the personal estate as if he were both legal and beneficial owner (*o*). Thus, at common law, it has been laid down that a sale of part of the goods by the administrator for the purpose of paying his own private debts, would be valid; that is, the sale could not be impeached as against the purchaser (*o*), although (as we shall presently see) the administrator would be personally liable to the creditors or next of kin of the deceased for the money so misapplied. The only exception to this general rule seems to be that dealings with the personal estate for an improper purpose, where not only the administrator but also the *person with whom he deals* is aware of the improper object of the transaction, are invalid as against the creditors or next of kin of the deceased, and in case of a sale the goods can be followed into the hands of the purchaser (*p*).

As regards the obligations to which the administrator becomes subject, he is, *prima facie*, bound to discharge them; but in case the personal estate be insufficient for the purpose he does not become liable to make good the deficiency out of his own private estate. It seems always to have been an established rule of English law that the administrator is bound by the obligations of the deceased only so far as the personal estate will enable him to satisfy them. In other words, the legal *persona* of the administrator as representative of the deceased is always kept distinct from his own private legal

(*n*) See *supra*, Pt. II., Chap. III.

(*p*) 2 Wms. Exors. p. 939, 8th ed.

(*o*) 2 Wms. Exors. p. 936, 8th ed.

*persona*; the goods of the deceased in the hands of the administrator cannot be seized by private creditors of the administrator, nor can the administrator's own goods be seized by creditors of the deceased (except in some cases where the goods have been mixed and those of the deceased cannot be identified); so, before the Act for the abolition of forfeiture for treason and felony (*q*), if an administrator were attainted of treason or felony his own goods would be forfeited, but not those which he held as administrator; and although, by reason of the attainder, he would have been disabled from suing *proprio jure*, yet he could still have maintained an action *as administrator* (*r*).

Where two or more administrators are appointed they are regarded in law as but *one person*, and in consequence the acts of any one of them, in respect of the administration of the effects, are deemed to be the acts of all. Hence a release of a debt by one is valid and binds the others; so, the sale or gift by one of the goods and chattels is the sale or gift of them all (*s*). But all co-administrators must join in bringing actions, and all must be joined as defendants where an action is brought against them (*t*).

#### B. *Rights and Obligations of the Administrator as Trustee for the Creditors and Next of Kin of the Intestate.*

Although the administrator, as representative of the deceased, has vested in him an almost unlimited power of dealing with the personal estate as he pleases, yet he is accountable, as trustee, to the creditors and next of kin of the deceased for the manner in which he exercises that power. He ought to exercise it only for the purpose of duly administering the estate, *i.e.*, (1) realizing the estate, (2) dis-

(*q*) 33 & 34 Vict. c. 23.  
(*r*) 1 Wms. Exors. p. 643, 8th ed.

(*s*) 2 Wms. Exors. p. 950, 8th ed.  
(*t*) *Ibid*.

charging obligations, and (3) distributing the residue of the estate amongst the next of kin of the deceased.

We will deal with each of these heads separately.

### I. *Realization of the estate.*

The administrator must collect the effects of the deceased, and as soon as possible sell all such property as may be of a wasting or perishable nature; he must call in debts and enforce other rights *in personam*, that is, he must turn all *choses in action* into *choses in possession*. Generally speaking, he must sell all the goods and chattels which come into his possession, in order to pay debts and distribute the residue, but this is not necessary, as regards the residue, if the next of kin agree among themselves to take it *in specie* with the consent of the administrator. The money and other *choses in possession* which come into the hands of the administrator directly, or as the result of the realization, together with the value of such as would have come into his possession if he had used reasonable diligence, constitute what are called the *personal assets* of the intestate, that is, the whole of the property available for the discharge of debts or other obligations of the intestate. In realizing the estate, the administrator is only personally liable to make good losses caused by his own negligence or other default, *e. g.*, if through unnecessary delay in bringing an action a debt becomes barred by the Statute of Limitations (*u*), and so is lost to the estate, he must make good the loss; but he is not liable for losses which he could not, with reasonable care and diligence, have prevented, as when a debtor to the estate becomes bankrupt, and so only a small percentage of the debt is paid over to the administrator.

After the estate is realized, he is personally liable to the extent of the assets; so if any of them be lost through his

(*u*) 2 Wms. Exors. p. 1804, 8th ed.



negligence or maladministration, or if he misapplies or wastes them in any manner, he will be bound to make good the loss.

In all such cases, where an administrator causes loss to the estate he is administering, he is, in technical language, said to be guilty of a *devastavit*.

## II. *Discharge of obligations.*

Before discharging any obligation the administrator must require reasonable proof of its existence, and, if such proof be not produced, he must refuse to discharge the obligation. In such a case he will be entitled to pay, out of the assets, the expenses of defending an action brought to establish the obligation, although it may happen that the action is decided against him. On the other hand, if he discharges a supposed obligation without requiring reasonable proof, and it subsequently appears that the obligation did not exist, he will be guilty of a *devastavit (w)*, and therefore personally liable to make good any loss thereby occasioned to the personal estate. It has, however, been decided that an administrator is justified in paying a debt barred by the Statute of Limitations, although it is discretionary with him whether he pays it or not (*x*).

The discharge of an obligation may require the expenditure of money by the administrator, or it may merely require the doing of some act, as the delivery of goods sold by the intestate, or bailed with him. Of course, the administrator must duly discharge all obligations of the latter class, but *prima facie* he is only bound to discharge those of the former class, so far as the personal assets will enable him to do so.

When the discharge of an obligation requires the payment of a *certain liquidated sum of money*, the obligation is called a *debt*, and some special rules have been established respecting the discharge of this kind of obligation to which we must now briefly refer.

(w) 2 Wms. Exors. p. 1809, 8th ed.

(x) *Lewis v. Rumney*, L. R. 4 Eq. Ca. 451.

In paying the debts of the deceased the administrator must observe the *rules of priority* established by law.

In case the assets are not sufficient to pay all the debts of the deceased, certain creditors are entitled to be paid in preference to other creditors, and it may, therefore, happen that some will be paid in full, while others receive nothing. Now, provided the administrator observes the rules of priority in paying debts, he will, in such a case, be under no personal liability to the unpaid creditors, after the assets are exhausted in paying the creditors who have priority. And if the unpaid creditors sue him he merely has to prove that he has fully administered the estate, *i. e.*, that he has disposed of all the assets in paying debts entitled to priority—called a plea of *plene administravit*; and upon this plea the creditors are only entitled to a judgment that they shall be paid out of any future assets that may come into the administrator's hands; which judgment is called a judgment of assets *in futuro* or *quando acciderint*. But if, on the other hand, the administrator neglects to observe the rules of priority, and, after the assets are exhausted, a creditor who is entitled to be paid in priority to the others remains unpaid, the administrator will be liable to pay such creditor out of his private estate, for the plea *plene administravit* will be of no avail unless debts have been paid in due order of priority.

The following is the order of priority to be observed by the administrator in paying debts (*y*) :—

- (1) Necessary funeral expenses.
- (2) Expenses incurred in taking out letters of administration, and other expenses of administration.
- (3) Debts due to the Crown by *record* or *specialty*.
- (4) Debts to which particular statutes give priority.

The principal seem to be, money due from a deceased overseer which he had received by virtue of his office (17 Geo. II.

(*y*) See 2 Wms. Exors. pp. 992 *et seq.*, 8th ed.

c. 38, s. 3); money due from a deceased person which he had received as officer of a friendly society (33 Geo. III. c. 54, s. 10; 38 & 39 Vict. c. 60, s. 15, sub-s. 7); regimental debts of deceased officers and soldiers (26 & 27 Vict. c. 57).

(5) Debts of record. These have priority *inter se* as follows:—

(i) Judgments of courts of record, including registered decrees, orders of a court of equity or bankruptcy, and other orders having the operation of a final judgment (z).

(ii) Recognizances, and, at one time statutes Merchant and Staple; but statutes Merchant and Staple are now obsolete.

(6) Debts due to the Crown on simple contract (a).

(7) All other debts, whether by simple contract or by specialty (*i.e.* secured by deed), are payable in equal degree. This has been the law since 32 & 33 Vict. c. 46; before that Act specialty debts had priority over those by simple contract.

If, however, a debt was due from the deceased to the administrator, the administrator has the right to pay himself before he pays other debts in the same degree as his own.

Amongst creditors in equal degree, he who first obtains judgment for his debt will be entitled to be paid first, and the administrator cannot resist the action on the ground that there will be nothing left for the other creditors in that degree; but he may resist it on the ground that there is not enough to pay a creditor of higher degree. And this defence he is bound to make if he have notice that a higher debt is outstanding; otherwise, on deficiency of assets, he must answer for such debt out of his own estate (b), for in such cases the law treats the omission to resist the action as an

(z) 23 & 24 Vict. c. 38, s. 5.

(b) 2 Steph. Com. p. 218, 10th

(a) 2 Wms. Exors. p. 997, 8th ed. ed.

*admission* by the administrator that he has sufficient assets to satisfy both debts, and this presumption the administrator will not be allowed to rebut by proving that in fact he had only sufficient to pay the inferior debt (*c*).

In other cases, also, the administrator may become personally liable to satisfy debts, when the assets are insufficient to pay them, by an *admission of assets* in excess of those which actually came into his hands. It seems that any words or conduct of the administrator, which would reasonably have the effect of leading creditors to presume that he had sufficient assets to satisfy their debts, will amount to an admission of assets (*d*).

We have seen that the administrator is personally liable for the discharge of the obligations *to the extent of the personal assets*. If therefore, after paying all debts of which he had notice, he distributes the residue of the assets amongst the next of kin, and subsequently a creditor, of whose claim he was ignorant, demands payment of a debt, the administrator will be liable to pay it out of his own estate, although in this case he will have a right to compel the next of kin to refund the amount which he has been obliged to pay to the creditor (*e*). But by a statute of the present reign (*f*) it is provided that where an administrator shall have given notice, such as would have formerly been given by the Court of Chancery (and now by the Chancery Division) in an administration action, for creditors to send in their claims, he shall, after the expiration of the time named in such notice for the sending in of claims, be at liberty to distribute the residue, and shall not be liable, as to the assets so distributed, to any person of whose claim he had no notice at the time of distribution. But any creditor or claimant may follow the assets

(*c*) 2 Wms. Exors. p. 2058,  
8th ed.

(*e*) *March v. Russell*, 3 My. &  
Cr. 31.

(*d*) *Ibid.* p. 2059.

(*f*) 22 & 23 Vict. c. 35, s. 29.

into the hands of the persons to whom they have been distributed. The Court of Chancery usually required such notice to be given by advertisement in the *London Gazette*, and generally in the *Times* newspaper, or, where the deceased had been resident in the country, in some newspaper circulating in that neighbourhood (*g*), but if there be any reasonable ground for supposing that any persons having claims upon the estate are residing in a foreign country or in one of the colonies, the notice should also be advertised in such foreign country or colony (*h*).

The statute last referred to (*i*) also protects administrators from all liability in respect of the rents or covenants in a lease or agreement for a lease granted or assigned to or made with the intestate, and in respect of rent or covenants contained in any conveyance on chief rent or rent-charge, or agreement for such conveyance, granted to or made with the intestate, after such lease, or agreement, or the property contained in the conveyance, shall have been assigned, or conveyed to a purchaser; provided the administrator has satisfied all liabilities which accrued due up to the time of such assignment or conveyance, and has set apart a sufficient sum to answer any future claims which may be made in respect of any "fixed and ascertained sum" covenanted or agreed to be laid out on the leasehold or other property, although the time for laying out the same may not have arrived (*k*).

The administrator will of course become personally liable if he chooses to promise to "answer damages out of his own estate" provided such promise and the consideration for it be in writing, signed by the administrator or his agent (*l*).

In case the intestate dies insolvent, any creditor, whose

(*g*) *Wood v. Weightman*, L. R. 13 Eq. 434.

(*h*) *Newton v. Sherry*, 1 C. P. D. 246.

(*i*) 22 & 23 Vict. c. 35.

(*k*) Sects. 27, 28.

(*l*) 29 Car. II. c. 3, s. 4; Anson, Contracts, p. 60, 5th ed.

debt would have been sufficient to support a bankruptcy petition against the intestate had he lived, may present a petition for the administration of the estate according to the law of bankruptcy (*m*); and unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts, an order for the administration in bankruptcy may be made (*n*). After notice of the presentation of the petition no payment or transfer of property made by the administrator will operate as a discharge to him "as between him and the official receiver," but any payment made or act done in good faith by the administrator *before notice* of the petition is valid (*o*).

Upon the order being made for the administration of the estate in bankruptcy, all the property of the intestate will vest in the "official receiver of the Court, as trustee thereof, and he shall forthwith proceed to realize and distribute the same in accordance with provision of" the Bankruptcy Act (*p*).

### III. *Distribution of the Residue.*

After paying the debts and discharging the other obligations which are binding upon him as administrator, and after deducting any expenses which he may have paid out of his own pocket (*q*) in administering the estate, the administrator is required by the Statutes of Distribution (passed in the reigns of Charles II. and James II. (*r*)), to distribute the residue of the assets amongst the children or other next of kin of the intestate in the manner provided by those statutes.

We must, therefore, attempt to explain the provisions of

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125, sub-s. 1.

(*n*) Sub-sect. 2.

(*o*) Sub-sect. 9.

(*p*) Sub-sect. 5.

(*q*) The administrator is not

allowed to make any profit for himself out of the estate, therefore he cannot charge for his time and work in administering.

(*r*) 22 & 23 Car. II. c. 10, and 1 Jac. II. c. 17.

these statutes, so far as they relate to the distribution of the residue, and, in order to do so with as much clearness as possible, it will be better to give the effect of these provisions in the form of rules, than to take each section in order and write a commentary upon it. The section of the statutes, or the decision of the Courts in construing the statutes, upon which each rule is founded, will be referred to in the notes.

A. *Where the intestate was a male.*

1. If the intestate leave a widow *and* children or other descendants, the widow will be entitled to *one third* of the residue, and the children or other descendants to the remaining *two thirds* (s).

It may happen, however, that the widow's right to her third has been taken from her, or as it is said, barred, by a provision in her marriage settlement (t), or otherwise, and in this case the children or descendants will be entitled to the whole of the residue.

The share of the residue to which the children or other descendants are entitled is divisible amongst them in the following manner, *no distinction being made between males and females* :—

(1) If the intestate leave children living, and there be no issue living of children who died in his lifetime, the children will all be entitled to equal shares (u). Or, as it is said, they take *per capita*, that is, they are entitled to equal shares in their *own right*, and not as representing another person.

But the statute expressly provides (x) that if any child shall have any estate by the settlement of the intestate, or shall have been advanced by him by a portion or portions during his life, such child shall only receive so much of the

(s) Car. II. s. 5.

(u) Car. II. s. 5.

(t) *Buckingham v. Drury*, 3 Bro.

(x) *Ibid.*

P. C. 492.

residue as will, when added to the value of the estate or portion already received, make his or her actual share of the intestate's property equal (as nearly as can be estimated) to the share of each of the other children. This is called, bringing the share of such child into "*hotchpot*." This provision, however, expressly excepts the case of the heir-at-law acquiring any land of the intestate by descent or otherwise; under such circumstances, therefore, the heir-at-law is entitled to an equal share of the residue with the other children, in addition to the land so acquired.

(2) If the intestate leave children living, and there be *also* issue living of children who died in his lifetime, the issue of each deceased child will be entitled to the share which their parent would have taken had he (or she) lived (*z*).

In this case the issue are said to take *per stirpes*, that is, they do not take in their own right as next of kin of the intestate, but as representing their deceased parent.

*E.g.*, A. has three children, B., C., and D., of whom B. and C. die in the lifetime of A., B. leaving two children and C. four. A. dies intestate, and the residue divisible amongst his descendants is 600*l.*: the 600*l.* must be divided into three equal parts of 200*l.* each, one of which must be given to D., one to B.'s children, and one to C.'s children. Thus B.'s children get 100*l.* each, and C.'s 50*l.* each.

(3) If at the death of the intestate there be no children living, but only issue of deceased children, such issue will be entitled to take *per stirpes* (*a*).

*E.g.*, A. has three children, B., C., and D., who all die in his lifetime, B. leaving *one* child, C. leaving *two* children, and D. leaving *four*. A. dies intestate, and his residue divisible

(*z*) Car. II. s. 5.

(*a*) Car. II. s. 5, as construed in *Re Ross's Trusts*, L. R. 13 Eq. 286; and *Re Natt*, 37 Ch. D. 517. The contrary construction given in 2 Wms. Exors. p. 1503, 8th ed.,

where it is laid down that if all the issue claim in their own right, *e.g.*, all are grandchildren, they take *per capita*, appears to be no longer law.



amongst descendants is 600%. The 600% must be divided into three equal shares, and B.'s child will be entitled to one, C.'s two children to another, and D.'s four children to the third; thus C.'s children get 100% each, and D.'s children 50% each.

Again, suppose B.'s child, whom we will call X., had also died before A. leaving two children; in this case X.'s children would be entitled to their parents' share, and each would get 100% (c).

2. If the intestate leave children or other descendants but no widow, the children or other descendants will be entitled to the whole residue (d), and it will be divisible amongst them in the manner already explained.

3. If the intestate leave a widow, but no children or other descendants, the widow will be entitled to one half of the residue, and the next of kin will be entitled to the other half (e); but if the intestate leave *no next of kin* the Crown will be entitled to the other half (f).

The order in which the next of kin are entitled will be explained in the next rule.

4. If the intestate leave neither widow nor descendants his kindred in the ascending and collateral lines will be entitled to the whole of the residue (g) in the following order, *no distinction being made between males and females or between the whole blood and half blood (h)*, except in the one case of the father being preferred to the mother.

(1) The father of the intestate, if living, will be entitled to the whole residue. This is the *only exception* to the rule that males are not to be preferred to females.

(2) If the father of the intestate be dead and his mother be living, then

(c) According to the construction adopted in 2 Wms. Exors. p. 1503, 8th ed. (see note (a) on the preceding page), the 600% would have been divided into *seven* equal shares, and, in the first example, each of A.'s grandchildren would have taken one; in the second example, the six surviving grand-

children would have taken one each, and X.'s two children would have divided the remaining share between them.

(d) Car. II. s. 5.

(e) *Ibid.* s. 6.

(f) *Cave v. Roberts*, 8 Sim. 214.

(g) Car. II. s. 7.

(h) *Smith v. Tracy*, 1 Mod. 209.

(a) If the intestate leave no brothers or sisters, or *children* of brothers or sisters, the mother will be entitled to the whole residue.

(b) If the intestate leave brothers or sisters, but no children of brothers or sisters who died in his lifetime, the mother and brothers or sisters are entitled to equal shares of the residue (*i*).

*E.g.*, A. dies intestate, leaving his mother, two brothers and a sister, but no nearer relations surviving. The residue must be divided into four equal shares, and the mother, two brothers, and sister each take one.

(c) If the intestate leave brothers or sisters and *also* children of brothers or sisters who died during his lifetime, the children of each of the deceased brothers or sisters will be entitled to the share which their deceased parent would have taken had he (or she) lived (*i*).

*E.g.*, A. dies intestate, leaving his mother, a brother, a sister, and two children of a deceased brother, but no nearer relations, surviving. The residue must be divided into four equal shares; the mother takes one, the brother another, the sister another, and the two children of the deceased brother the remaining share, which will be divided between them equally.

(d) If the intestate leave neither brothers nor sisters, but children of brothers or sisters who died during his lifetime, the mother will be entitled to the same share as she would have taken had there been brothers or sisters living (*k*).

Thus, where an intestate left a widow and a mother and several nephews and nieces, the children of a deceased brother, it was held that the residue was divisible into four equal parts, two of which were to be given to the widow (being her half share of the residue) (*l*), one to the mother,

(*i*) Jac. II. s. 7.

455.

(*k*) *Stanley v. Stanley*, 1 Atk.

(*l*) *Supra*, p. 111.

and one to the nephews and nieces, to be divided amongst them in equal shares (*m*).

N.B. The rule that the issue shall represent their deceased ancestor only applies, amongst collateral relations, in the case of *children* of a deceased brother or sister (*n*); for instance, grandchildren of a brother or sister would not be entitled to represent the brother or sister.

(3) If the intestate leave neither father nor mother, but either brothers or sisters only, or brothers or sisters and *also* children of brothers or sisters who died in his lifetime, then,

(a) The brothers or sisters will be entitled to the whole residue in equal shares (*o*) if there be no children of deceased brothers or sisters;

(b) If there be children of deceased brothers or sisters, the children of each deceased brother or sister will be entitled to the share to which their parent would have been entitled had he (or she) lived (*p*).

N.B. If there be neither brother nor sister living at the death of the intestate, the children of a deceased brother or sister (*i. e.*, the nephews and nieces of the intestate) are only entitled to a share in the residue under the next rule.

(4) If the intestate leave neither father, mother, sister, nor brother, then all persons who are in the nearest degree of kindred to the intestate, whether they be ascendants or collaterals, and whether in the paternal or maternal line, will be entitled to the whole residue *per capita*; but if there be only one person in the nearest degree he or she will take the whole residue (*q*).

(*m*) *Stanley v. Stanley*, 1 Atk. 455.

(*n*) Car. II. s. 7.

(*o*) It was decided as early as 1686 that brothers and sisters are preferred to grandfathers

and grandmothers, although both classes are in the same degree. *Evelyn v. Evelyn*, 3 Atk. 762, and cases there cited.

(*p*) Car. II. ss. 6, 7.

(*q*) *Ibid*.

The manner of calculating the degrees of relationship has already been explained (*r*).

The application of this rule may be illustrated thus:—A. dies intestate, and his only surviving relations are (1) a maternal great-grandfather, (2) a paternal great-grandmother, (3) a paternal uncle, (4) a maternal aunt, (5) a nephew, and (6) a niece. It will be seen by reference to the table given on p. 88, *supra*, that all these six persons are in the third degree of kindred to the intestate, and, there being no surviving relations in either the first or second degree, the third degree is, under the circumstances, the *nearest degree*. The whole residue of A.'s estate must therefore be divided into six equal parts by A.'s administrator, and one part must be given to each of these six persons.

A curious point arises where the only relations of an intestate are his grandfather or grandmother and nephews or nieces. The grandfather being in the *second* degree and nephews and nieces in the *third*, it is obvious that, if rule (4) applies to this case, the grandfather will be entitled to the whole residue, to the total exclusion of the nephews and nieces, although, as we have seen (R. (2) (d)), nephews and nieces are entitled to share the residue with the *mother* of the intestate. It is clearly inconsistent with the policy of the law governing distribution that the nephews and nieces should thus be entirely excluded by the more remote, and entitled to share with the nearer, relation of the intestate; and the inconsistency becomes still more glaring when we remember that, if the mother be living, the grandfather or grandmother will be entirely excluded from a share in the residue. The point seems never to have arisen in practice, nor to have been discussed by the text books (*s*), and must therefore be treated as doubtful; it seems probable, however,

(*r*) *Supra*, p. 84.

(*s*) See note to Chitty's Statutes, vol. ii. p. 858, 4th ed.

that, if it should arise, it will be decided in favour of the nephews and nieces sharing the residue with the grandfather or grandmother.

N.B. The rule that the issue of a deceased person shall represent their parent has no application amongst *ascendants* and *collaterals*, except in the cases already mentioned (RR. (2) (c), (3) (b)), where the *children* of a deceased brother or sister have the right to represent their parent (t).

Thus, if A. die intestate leaving no relations except an uncle and the children of a deceased uncle, the uncle, being in a nearer degree than such children, will be entitled to the whole residue.

(5) If the intestate leave no next of kin at all, the Crown will be entitled to the whole residue.

The order in which ascendants and collaterals are entitled to distribution may be briefly summarized as follows :—

1. The father.
2. The mother, together with brothers and sisters and *children* of deceased brothers or sisters.
3. Brothers and sisters, or brothers and sisters *together with* children of deceased brothers or sisters.
4. Paternal or maternal grandfathers or grandmothers, [probably together with nephews and nieces, although in the *third* degree].
5. All relations in the *third* degree, *i. e.*, great-grandfather or great-grandmother, uncles and aunts, nephews and nieces.
6. All relations in the *fourth* degree, *i. e.*, great great grandfathers, great great grandmothers, great uncles, great aunts, great nephews, great nieces, and cousins german.
7. All relations in the fifth degree, and so on.

(t) Car. II. s. 7.

B. *Where the Intestate was a Female.*

1. If the intestate had never been married, her next of kin in the ascending and collateral lines will be entitled to the whole residue, in the same manner as the next of kin of a male who dies without leaving a widow or descendants surviving are entitled to his residue.

2. If the intestate had been married, the rules which regulate the distribution of the residue depend upon the question whether she was a widow at the time of her death, or whether at that time she had a husband living.

(1) If the intestate was a widow, then, subject to the following exception, the same rules apply which have already been stated respecting the distribution of the residue of a male, who dies without leaving a widow surviving.

*Exception.*—A child who has been *advanced* (y) by the intestate in her lifetime is *not* bound to bring the value of such advancement into *hotchpot* (z).

Thus, where a widow settled 1,000*l.* upon her daughter and afterwards died intestate, leaving the daughter and two sons surviving, it was held that the daughter was entitled to an equal share of the residue with the two sons notwithstanding that she had already received 1,000*l.* (a).

(2) If the intestate leave a husband surviving, the husband will be entitled to the whole residue (b).

The husband is entitled to the residue *jure mariti* and not under the Statutes of Distribution.

Where the marriage took place before the 1st January, 1883, all the *choses in possession* of the wife vested in the husband

(y) See *supra*, p. 109.

(a) *Ibid.*

(z) *Holt v. Frederick*, 2 P. Wms.

(b) 29 Car. II. c. 3, s. 25.

immediately the marriage was solemnized, unless, by statute or settlement, they were her *separate property* (c). If they were her separate property, the separate use was extinguished by the death of the wife and the right to the property immediately vested in the husband *jure mariti* (subject, of course, to the terms of any settlement), without the necessity of taking out administration to his wife's estate (d). It is conceived that the Married Women's Property Act, 1882 (e), has not altered the law in this respect.

As regards *choses in action* which were not separate estate, unless the husband had reduced them into possession before the death of his wife, he had no legal claim to them until he had taken out administration; and of course administration was necessary when they were her separate estate. Consequently, if a husband died before he had taken out administration, the old practice in the Ecclesiastical Courts was to grant administration to the next of kin of the wife, the Courts considering themselves bound to do so by the words of 31 Edw. III. St. 1, c. 11 (f). But the courts of equity seem always to have regarded the husband as having a kind of vested interest in the *choses in action* of his wife from the moment of her death, and accordingly they treated the next of kin of the wife to whom administration had been granted as merely trustees of the residue for the personal representatives of the deceased husband (g). And it now appears to be the established rule to grant administration, in such cases, to the personal representatives of the husband (h), upon the principle, already stated, that the grant of administration ought to follow the beneficial interest in the estate.

(c) As to separate property, see *post*, p. 167.

(d) *Moloney v. Kennedy*, 10 Sim. 254; and see *Cooper v. Macdonald*, 7 Ch. D. 288, 296.

(e) 45 & 46 Vict. c. 75; its chief

provisions will be found at pp. 170, 171, *post*.

(f) *Supra*, p. 83.

(g) *Cart v. Rees*, cited in *Squibb v. Wyn*, 1 P. Wms. 381.

(h) 1 Wms. Exors. p. 417, 8th ed.

After the Statutes of Distribution came into force a doubt was felt whether, under those statutes, the husband who had taken out administration to his deceased wife's estate could not be compelled to make distribution of the residue amongst her next of kin. This doubt was removed by 29 Car. II. c. 3, s. 25, which expressly affirmed the husband's common law right to the whole residue for his own benefit.

The statute 22 & 23 Car. II. expressly provides that no distribution of the residue shall be made until the expiration of *one year* from the death of the intestate (*i*). The object of this provision was to give the creditors time to send in their claims, and to give the administrator time to realize the estate and pay debts, &c., before the next of kin could demand distribution. But it must be observed that the right to share in the distribution, in case there be any residue, is a right which vests in the next of kin at the instant the death takes place (*k*). For example, A. dies intestate, his sole next of kin being two uncles, B. and C.—the right to a share of the residue vests immediately in B. and C.; and accordingly, if B. dies the next day, this right will pass, as part of his personal estate, to his personal representatives, who at the expiration of a year from A.'s death will be entitled to demand payment of B.'s share.

The administrator must, with some exceptions, pay a certain duty in respect of each share of the residue handed over to the next of kin, such duty being deducted from the share in respect of which it is payable (*l*).

It must be observed that the Statutes of Distribution did not affect certain customs, regulating the distribution of the residue, which prevailed in London and York (*m*). However, a statute of the present reign (*n*) provides that, "The special customs concerning the distribution of the personal estate of

(*i*) Sect. 8.

(*k*) *Browne v. Shore*, 1 Show. 25.

(*l*) See Appendix.

(*m*) 22 & 23 Car. II. c. 10, s. 4.

(*n*) 19 & 20 Vict. c. 94.



intestates observed in the city of London, or in relation to the citizens and freemen of such city, and in the province of York, and certain other places, shall, with reference to all persons dying on or after the 1st day of January, 1857, *wholly cease and determine*, and the distribution of the personal estate of all persons so dying shall take place as if such customs had never existed, and as if the rules for the distribution of the personal estate of intestates generally prevalent in the province of Canterbury had prevailed throughout England and Wales, any law or statute to the contrary notwithstanding" (o).

We must now consider by what law the distribution will be regulated in case the intestate dies domiciled in England leaving personal property in some other part of the United Kingdom or abroad, or in case he dies domiciled abroad or in some part of the United Kingdom other than England, leaving personal property in England. In such cases the established rule is that the distribution of the personal estate is to be regulated by the law of the country where the intestate was domiciled at the time of his death, without any regard whatsoever to the situation of the property at that time (p). Thus, if A. dies intestate domiciled in England leaving personal property in Ireland, Scotland, and France, the distribution of such property will be regulated by the rules of English law which we have just been considering; but if A. dies domiciled in Scotland, or France, leaving personal property in England, the distribution of such property will be regulated by the rules laid down by the law of Scotland, or France, as the case may be.

As to the consequences of a person intermeddling with the estate of the deceased without having taken out letters of administration, see *post*, p. 227.

(o) *Ibid.* s. 1.

(p) 2 Wms. Exors. p. 1521,

8th ed.; citing *Somerville v. Somerville*, 5 Ves. 786.

## CHAPTER II.

## THE SUCCESSION OF THE HEIR.

THE succession of the heir will be dealt with under the two following heads:—

1. The rules of descent, *i.e.*, the rules for ascertaining the person or persons entitled to succeed to the real estate as *heir* of the deceased (*a*).
2. The rights and obligations of the heir.

SECTION I.—*The Rules of Descent.*

The rules of descent may be conveniently divided into two classes, namely—

- I. The rules of descent established by the general law.
- II. The rules of descent established by local customary law.

The former rules apply in all parts of England and Wales, except in those particular districts or places where the latter rules are proved to exist.

I. *The Rules of Descent established by the General Law.*

In 1833 the “Act to amend the law of inheritance” (*b*)—usually called “the Inheritance Act”—was passed, and effected some most important alterations in those old rules of descent which we have already had occasion to discuss (*c*).

(*a*) When two or more persons are entitled to succeed together, they constitute but *one heir* in contemplation of law. See *post*,

p. 133.

(*b*) 3 & 4 Will. IV. c. 106.

(*c*) *Supra*, p. 27.

The rules of descent, as amended by the Inheritance Act, apply in every case where the intestate died *on or after the 1st January, 1834*. The old rules apply in every case where the intestate died *before* that date.

The following are the rules of descent as amended by the Inheritance Act, together with a new rule introduced by a statute of the present reign (*d*); the alterations in the old law are indicated by dark type.

1. "The descent shall be traced from the purchaser (*e*)."

This rule supersedes the old rule, which required that the descent should be traced from the person last seised (*f*).

The Inheritance Act defines (*g*) the purchaser as "the person who last acquired the land otherwise than by *descent*, or than by any *escheat*, *partition*, or *enclosure*, by the effect of which the land (*h*) shall have become part of or descendible in the same manner as other land acquired by descent." But it also provides that "the person last entitled to the land" (*i.e.*, "the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof" (*i*)) shall "be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall, in every case, be considered to have been the purchaser, unless it be proved that he inherited the same" (*k*).

The Act also provides that where a person acquires land by

(*d*) 22 & 23 Vict. c. 35, s. 19.

(*e*) 3 & 4 Will. IV. c. 106, s. 2.

(*f*) *Supra*, p. 27.

(*g*) Sect. 1.

(*h*) "Land" is used in the Act as meaning *all kinds of real property*. See sect. 2.

(*i*) Sect. 1.

(*k*) Sect. 2.

purchase under a limitation to "the heirs" or "the heirs of the body" of any ancestor, contained in a deed executed after the 31st December, 1833, or under the same limitation, or a limitation having the same effect contained in a will of any testator who dies after the 31st December, 1833, such land shall descend, and the descent be traced, as if the ancestor named in the limitation had been the purchaser thereof (*l*); *e.g.*, limitation to A. for life and after his death to the heirs of B. A. dies; X. is the heir of B.; if X. dies intestate and without issue, the descent must be traced from B., as if he had been the purchaser. Under limitations of this kind, the words "heirs" or "heirs of the body" are words of purchase, and the heir gets an estate in fee simple or in tail, without any further words of limitation.

The Act further provides that a conveyance or devise of an estate of inheritance to the heir of the person who conveys or devises the estate, shall, if it takes effect on or after the 1st January, 1834, make the heir the purchaser (*m*), thus reversing the old rule (*n*); *e.g.*, A. conveys land to B. on or before the 31st December, 1833; on A.'s death B. proves to be A.'s heir-at-law; B. dies intestate. In this case the descent must be traced from A. according to the old rule. But supposing the conveyance had been made on or after the 1st January, 1834, B. would have been the purchaser, and the descent must have been traced from him under the new rule. So, if A. had devised the land to B., and A. had died on or before the 31st December, 1833, and then B. had died intestate, the descent must have been traced from A.; but if A. had died on or after the 1st January, 1834, B. would have been the purchaser, and descent must have been traced from him.

2. "Inheritance shall lineally descend to the issue of the" purchaser "*in infinitum*."

(*l*) Sect. 4.

(*m*) Sect. 3.

(*n*) *Supra*, p. 29.

The Act makes no new provisions as to the succession of the issue, it merely alters the root from which the succession is traced; therefore, the old rule holds good as to the issue, except that "*purchaser*" must now be substituted for the "*person last seised*" (o).

3. "The male issue shall be admitted before the female" (p).

4. "Where there are two or more males in equal degree the eldest only shall inherit, but the females all together" (q).

5. "The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living" (r).

6. "Where there shall be no issue of the purchaser his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendants of such lineal ancestor" (s).

This simply abolishes the old rule that inheritances could not ascend (t). For instance, the father of the purchaser is entitled in preference to the brothers and sisters of the purchaser, or to the uncle or aunt of the purchaser—formerly the uncle or aunt would have been entitled if there had been no descendants of the father.

Of course, if the nearest ancestor be dead, his descendants will succeed by force of r. 5 before the next nearest ancestor becomes entitled; *e.g.* the descendants of the father are entitled in preference to the grandfather.

7. None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their kindred (u), shall be capable of inheriting until all his paternal

(o) *Supra*, p. 27.

(p) *Supra*, p. 28.

(q) *Supra*, p. 28.

(r) *Supra*, p. 28.

(s) 3 & 4 Will. IV. c. 106, s. 6.

(t) *Supra*, p. 25.

(u) *I. e.*, blood relations.

ancestors and their descendants shall have failed; and no female paternal ancestor of such person, nor any of her kindred, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and no female maternal ancestor of such person, nor any of her kindred, shall be capable of inheriting until his mother and all his male maternal ancestors and their descendants shall have failed (*q*).

The only alteration in the old law is that the *ancestors* of the person from whom the descent is traced are included amongst the persons entitled to inherit, in accordance with the last rule. The male stock was under the old rules preferred to the female (*r*).

The effect of this rule may be summarised thus—

First, the father and male paternal ancestors, and their descendants, are entitled;

Secondly, female paternal ancestors and their kindred;

Thirdly, the mother and male maternal ancestors, and their descendants;

Fourthly, female maternal ancestors and their kindred (*s*).

The order in which female paternal and maternal ancestors succeed *inter se*, is dealt with by the next rule.

8. Where female paternal ancestors are entitled to succeed, the mother of a more remote male paternal ancestor and her kindred will be preferred to the mother of a less remote male paternal ancestor and her kindred; likewise where female maternal ancestors are entitled to succeed, the mother of a more remote male maternal ancestor and her kindred will be preferred to the mother of a less remote male maternal ancestor and her kindred (*t*).

(*q*) 3 & 4 Will. IV. c. 106, s. 7, combined with definition of descendants, sect. 1.

(*r*) *Supra*, p. 31.

(*s*) The reason why we speak of the *descendants* of the mother and all male ancestors, and of the

*kindred* of all other female ancestors, will be seen by a glance at the table of Descent on p. 128, *post*.

(*t*) 3 & 4 Will. IV. c. 106, s. 8; and see 1 Steph. Com. p. 417, 10th ed.

For example: A., the purchaser, dies intestate, and his only surviving next of kin are—B., his paternal grandmother, and her descendants; C., his paternal grandfather's mother, and her descendants; D., his maternal grandfather's mother, and her descendants; E., his maternal great grandfather's mother, and her descendants.

First. C. and her descendants will be entitled; if all die intestate without issue, then,

Secondly. B. and her descendants will be entitled; if all die intestate without issue, then,

Thirdly. E. and her descendants will be entitled; if they all die intestate without issue, then,

Lastly. D. and her descendants will be entitled.

The effect of this rule is to settle the doubt which formerly existed respecting the order in which the relations of female paternal and maternal ancestors were entitled to succeed (*t*); the new rule affirms the opinion which seems to have found most favour with the old authorities (*t*).

9. "Any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir," and the half blood is entitled to succeed—

- (1) "next after any relation in the same degree of the whole blood, and his issue where the common ancestor shall be a male; and
- (2) "next after the common ancestor where such common ancestor shall be a female" (*u*).

For example: A. has two sons, B. and C., and a daughter, D., by his first wife; and a son, E., and a daughter, F., by his second wife. B. purchases land and dies intestate without issue, and then his father, A., who would in this case have succeeded to the land (R. 6), dies intestate; C., D., E., and F. are all in the same degree of kindred to B., the purchaser, and A., their common ancestor, is a male, and therefore E.

(*t*) *Supra*, p. 32.

(*u*) 3 & 4 Will. IV. c. 106, s. 9.

and F., being of the half blood, will be entitled to succeed next after C. and D. and their issue, being the relations in the same degree of the whole blood and their issue; and so the order of succession will be—(1) C. and his issue, (2) D. and her issue, (3) E. and his issue, and (4) F. and her issue. Now let us suppose that A., the common ancestor, is the mother instead of the father of B., C., D., E., and F. At B.'s death intestate without issue his father will succeed (R. 6), and upon his father's death intestate C. will next succeed, and upon his death intestate and without issue D. will next succeed; if D. die intestate and without issue B.'s paternal ancestors will be next entitled successively (R. 7), and if they all die intestate and without issue B.'s mother, A. (R. 7), will succeed, and at her death intestate E. and his issue, and if he die intestate without issue F. and her issue will be entitled to succeed. Thus E. and F. succeed "next after the common ancestor."

It must be observed that the rule relates only to the half blood of "the person from whom the descent is to be traced," *i. e.*, from the purchaser; in all other cases the half blood succeeds in just the same manner as the whole blood, *e. g.*, A., the purchaser of an inheritance, has a son, B., and a daughter, C., by his first wife, and a son, D., and a daughter, E., by his second wife; A. dies intestate. In this case B. will succeed to the inheritance. Now suppose B. dies intestate without issue, D. will succeed to the inheritance; for as B. was not *purchaser* of the inheritance we must trace the descent from A., the purchaser, and D., being male issue of A., will be preferred to his daughter, C. So if D. die intestate without issue, C. and E. will succeed as co-parceners, both being female issue of A., the purchaser.

10. "Where there shall be a total failure of the heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a



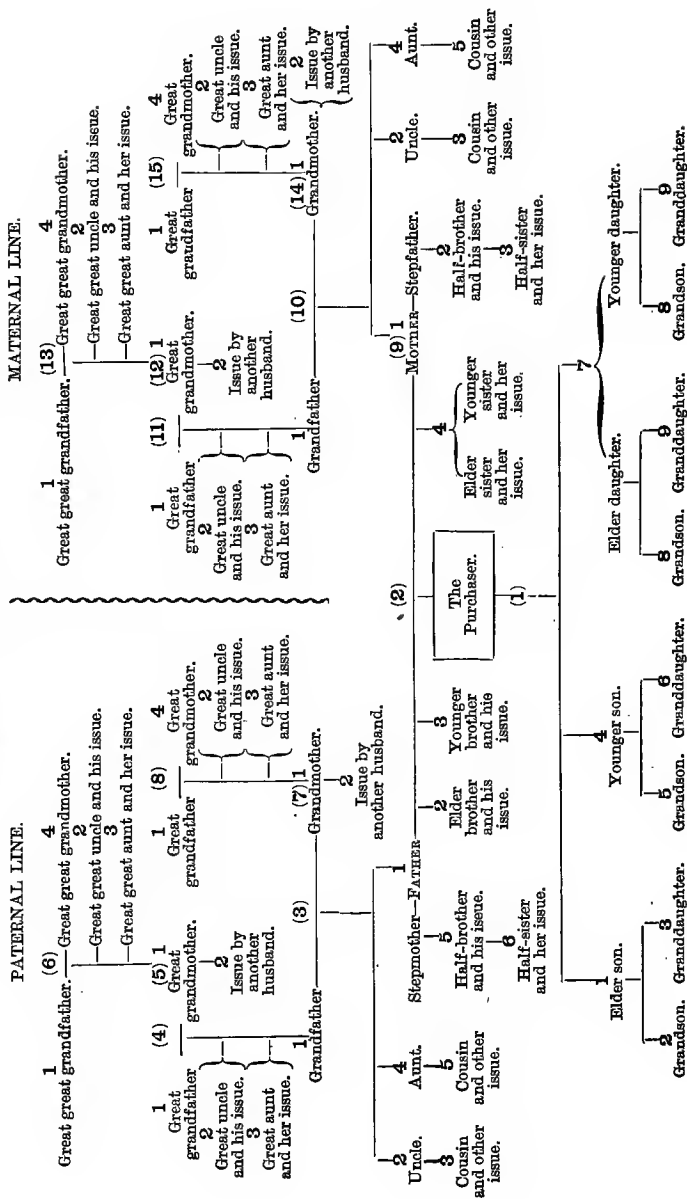
total failure of the heirs of such ancestor, then and in every such case the land shall descend, and the descent shall thenceforth be traced, from the person last entitled to the land, as if he had been the purchaser thereof" (x).

For example: A. purchases land and dies intestate, leaving an only child, B., and no ancestors, nor descendants of ancestors, surviving; B. dies intestate and without issue. In this case the land would formerly have escheated, for as B.'s maternal kindred could not trace their descent from the purchaser, they would not be entitled to succeed. But in accordance with Rule 10, the descent can be traced from B. "as if he had been the purchaser," and accordingly his mother, or other maternal ancestors or their issue, will be entitled to succeed.

In the Table of Descent given upon the following page the numbers (1), (2), &c., indicate the order in which the different groups of ascendants and descendants are entitled to succeed: *e. g.* (2) indicates that the father and his descendants by the mother and stepmother form the second group; while (9) indicates that the mother and her descendants by the stepfather form the ninth group. The plain figures indicate the order in which the persons in each group are entitled to succeed *inter se*. Every person to whom no plain figure is affixed is excluded from the succession—except of course in cases where Rule 10 applies.

(x) 22 & 23 Vict. c. 35, s. 19.

## TABLE OF DESCENT

*(Where the Death occurred on or after 1st January, 1834).*

Where a person dies without an heir, and intestate, in respect of any legal estate in real property, the lord of whom it is held, or if there be no such lord, the Crown, will be entitled to such property by *escheat*. But, formerly, where a legal estate in fee simple was vested in trustees in trust for a person in fee simple, and such person died without an heir and intestate, the trustees were beneficially entitled to the property; for an *equitable* estate did not escheat (*y*). However, by the Intestates Estates Act, 1884 (*z*), it is provided that when, after the 14th of August, 1884, “a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditaments, or of any equitable estate or interest in any corporeal hereditaments, whether devised or not devised to trustees by the will of such person (*a*), the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments.”

## II. *The Rules of Descent established by Local Customary Law.*

The Inheritance Act did not affect the customary rules of descent which, as we have seen (*b*), prevailed in certain localities, except that, according to some high authorities (*c*), the *purchaser* must now form the root of descent (*d*); in other words, the rule that “the descent shall be traced from the purchaser” will determine the person whose heir will be entitled to succeed; but in ascertaining which of his relations

(*y*) Wms. Real Prop. p. 193, 16th ed.

(*z*) 47 & 48 Vict. c. 71, s. 4.

(*a*) *Post*, p. 244.

(*b*) *Supra*, p. 34.

(*c*) Mr. Joshua Williams and Lord St. Leonards.

(*d*) *Muggleton v. Barnett* (1 H. & N. 282; 2 H. & N. 653) is opposed to this view of the effect of the Inheritance Act, but Mr. Joshua Williams' reasons for thinking that decision erroneous would seem to be decisive. See Appendix A., Wms. Real Prop.

is his heir, we must apply the customary rules of intestate succession which prevail in the particular locality where the land is situated.

The rules of descent established by the general law apply in every case (except where the land is situated in the county of Kent) unless a particular local custom be proved to exist; and accordingly the person who claims to be heir under a local custom must in every case establish his claim by bringing sufficient evidence of the custom, otherwise the person who is heir by the general law will be entitled to succeed to the property. But, where the land of the intestate is situated in the county of Kent, it seems to be the rule, that the persons who are entitled to succeed by the custom of gavelkind will in every case be the heirs, unless it be proved that the land of the intestate was not subject to the custom of gavelkind (*e*); by this custom all the sons, or, failing issue, all brothers or other collaterals, succeed to equal shares.

Again, in all cases where local customary rules of descent apply, the rules of intestate succession established by the general law are merely excluded so far as may be necessary to give due effect to the local rules. "You must first ascertain what the custom is, and then apply all the rules of descent to the custom so ascertained" (*f*). The two following cases will serve as illustrations. In *Clements v. Scudamore* (*g*) the facts were that J. S. purchased copyhold lands which were held subject to the custom of borough English (consequently at the death of J. S. intestate his youngest son would be entitled to succeed). J. S. had five sons, the youngest of whom died, leaving issue a daughter, before J. S. purchased the copyhold lands. At the death of J. S. intestate the youngest of the four surviving sons entered upon the lands. The question was, whether he or the daughter of the deceased

(*e*) 1 Mod. 98.

at p. 47.

(*f*) *Hook v. Hook*, 1 Hem. & M.

(*g*) 1 P. Wms. 63.

son was entitled to succeed to the lands, and it was decided in favour of the daughter. In giving judgment Lord Holt said: "Wherever this custom has obtained, the youngest son is there placed in the room of the eldest, who inherits by the common law; and there is *no difference in the course of descents, but that the custom prefers the youngest son, and the common law the eldest*; and therefore, as by the common law the issue of the eldest son, female as well as male, do, *jure representationis*, inherit before the other brothers, so by the same reason, *when this custom has transferred the right of descent from the eldest to the youngest son*, it [*i.e.*, the common law] shall also, by like representation, carry it to the daughter of the youngest son; and there is no ground to make any difference betwixt a descent by this custom and by the common law."

In *Hook v. Hook* (*h*) the facts were as follows: W. H. died intestate as to certain lands of gavelkind tenure. He left no issue, but a nephew S. H. and two sons of another nephew who died in his (W. H.'s) lifetime. S. H. and the deceased nephew were both sons of W. H.'s only brother. The question was, whether S. H. was entitled to the whole of the land, or whether the sons of the deceased nephew were entitled to represent their father and so take a moiety, and it was held that the sons were entitled to represent their father. Sir W. Page-Wood, V.-C., said, in the course of his judgment: "The canon of descent applicable to the point is laid down in *Clements v. Scudamore*, which was a case on borough English lands, where Chief Justice Holt said: 'The custom alters the descent by the common law to the eldest son, and carries it to the youngest son generally, and must have all the consequences of a descent.' Accordingly, the right of representation was admitted as a general incident of descent to operate upon the customary rule of preferring the younger

(*h*) 1 Hem. & M. 43.

son, exactly as it operated on the common law rule of preferring the eldest. The same principle must be applied, whether the custom be that of gavelkind or borough English."

It would be impossible in the present treatise to attempt an enumeration of the various rules of descent which have been proved to exist in particular districts.

In conclusion, we must observe that the succession to real estate is not, like the succession to personal estate, affected by the domicile of the deceased; the *lex loci rei sitæ* governs the succession, no matter where the deceased owner may have been domiciled (*k*). Thus, if A. die intestate domiciled in Scotland, leaving real estate and personal estate in England, the succession to the former will be governed by the English law, while the succession to the latter will be regulated by the law of Scotland. It seems that, in all countries except England, the law of the domicile decides all questions of legitimacy relating to the succession to real estate; but English law requires that the heir shall be legitimate according to both English law and the law of his domicile. The case which settled this point was *Birtwhistle v. Vardill* (*l*); the facts were shortly as follows:—A. died in 1825, intestate and without issue, seised of real estate in England. A. had several brothers who all died before him, and none of them left issue except B., who had an only son C. It appeared that in 1790 B. had gone to Scotland, and became domiciled there; that C. was born in 1799 of a woman with whom B. had cohabited, and that B. subsequently married her. This subsequent marriage made C. the legitimate son of B. according to Scotch law, and on B.'s death C. had succeeded to his real estate in Scotland. The question, therefore, was whether C., being legitimate by the

(*k*) Foote, Private Int. Juris. (*l*) 7 Cl. & F. 895.  
160.

law of Scotland, was legitimate also for the purpose of succeeding to A.'s real estate in England, and it was held that he was not entitled to succeed; for the law of England required that a person's heir should be "*ex justis nuptiis procreatus*."

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## SECTION II.—*The Rights and Obligations of the Heir.*

Where a person dies leaving two or more relations who are entitled to succeed together to his real estate—if, for instance, he leave two daughters and no son, or two sons who by local custom are both entitled to succeed—such persons are called *coparceners*, or, shortly, *parceners*, and they are regarded in law as constituting but one heir; that is, they are regarded as representing the deceased in their collective, and not in their individual, capacity—"jus descendit quasi uni hæredi propter juris unitatem. . . . Whereupon it followeth that, albeit where there bee two parceners they have moities in the lands descended to them, yet are they but one heire; and one of them is not the moity of an heire, but both of them are but *unus hæres*" (*m*).

We will, therefore, in the first place, use the term *heir* as including coparceners as well as a single heir, and afterwards explain shortly the difference between the interest of a single heir and that of a coparcener.

We have already attempted to point out the rights and obligations of a deceased person which pass to his real representatives (*n*). At the death of a person intestate, all such rights and obligations immediately vest in or become binding upon his heir—even against the will of the heir. No formality is necessary; the mere fact of death at once operates to pass these rights and obligations to the heir, and, to the extent of these rights and obligations, he is placed, in almost every respect, exactly in the legal position

(*m*) Co. Litt. lib. 3, 163 b.

(*n*) *Supra*, Pt. II., Chaps. II., III.

occupied by the intestate, or, in other words, becomes, to that extent, clothed with the legal *persona* of the intestate.

In respect of obligations, however, the legal *persona* of the intestate is kept distinct from that of the heir to this extent, that the heir only becomes personally liable to discharge the obligations of the intestate so far as the real estate will enable him to do so.

Besides the obligations which pass immediately to the heir—and upon which accordingly he may be sued—obligations to pay the simple contract debts of the intestate are, as we have seen (*p*), indirectly and contingently binding upon him—they bind him *indirectly* because the administrator succeeds to such obligations, and is *primâ facie* bound to satisfy them; they bind him only contingently, because he is not liable upon them until the personal estate has proved insufficient to discharge them; even when this happens an unpaid creditor cannot sue the heir for the debt in an ordinary action, but he must institute proceedings for the administration of the estate of the intestate (*q*).

The heir is also, generally, liable to pay *succession duty* in respect of the real estate to which he succeeds (*r*).

Where the heir succeeds to freehold or copyhold estates, and the intestate, if a male, leaves a widow, or, if a female, a husband surviving, the rights of the heir will in some cases be restricted by the right of the widow to *dower* or *freebench*, or of the husband to *curtesy*.

Dower was the right of the widow to have allotted to her, and to enjoy in severalty during her life, one third part of the lands in which her husband had been *solely seised* of any freehold estate of inheritance *in possession* during the coverture, and to which any issue of the widow might by possibility have succeeded (*s*). But if the land were subject to

(*p*) *Supra*, p. 79.

(*q*) *Supra*, p. 79.

(*r*) See Appendix.

(*s*) See Wms. Real Prop. p. 273, 16th ed.



the custom of gavelkind, the widow's right extended to a moiety of the land, and continued only so long as she remained unmarried and chaste.

The right to dower was barred altogether by a jointure agreed to be accepted by the intended wife previously to the marriage in lieu of dower; but if the jointure were made *after* the marriage, the widow might elect between her dower and her jointure (*t*).

The right to dower has been considerably modified by an Act passed in 1833 (*u*) "for the amendment of the law relating to dower." This Act gives the widow a right to dower in any lands in respect of which her husband had a right of entry or action, although the husband had not recovered possession, provided the dower were sued for or obtained within the period during which such right of entry or action might be enforced (*v*), and it extends the right to dower to any *equitable* estate of inheritance in possession (other than an estate in joint tenancy) to which the husband was beneficially entitled at his death (*x*). But the Act also provides that a widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land (*y*). It must be observed that the Act does not extend to the dower of any woman married on or before the 1st January, 1834, and does not give to any will, deed, contract, engagement, or charge executed, entered into, or created before that date the effect of defeating or prejudicing any right of dower (*z*).

Freebench is the right of the widow to an interest in the copyhold lands of her husband, and it generally consists in a

(*t*) Wms. Real Prop. p. 276, 16th ed.

(*u*) 3 & 4 Will. IV. c. 105.

(*v*) Sect. 3.

(*x*) Sect. 2.

(*y*) Sect. 6.

(*z*) Sect. 14.

life interest in one divided third part of such lands, or sometimes in the entirety (a). But right to freebench only arises where it is sanctioned by a special custom of the manor, and the right does not extend to equitable interests of the husband in copyhold land.

The Act for the amendment of the law relating to dower does not extend to freebench (b).

Curtesy is the right of the husband to a life estate in the lands and tenements of which his deceased wife was solely seised in fee simple or fee tail in possession, provided he has had issue of her born alive who might by possibility inherit the estate as her heir (c). The right to curtesy extends to equitable estates of inheritance (d).

In the case of lands subject to the custom of gavelkind, it is not necessary that the husband should have had issue, but he is only entitled to a moiety of his wife's lands, and his interest ceases if he marries again (e).

In the case of copyhold land, it seems that the husband is not entitled to curtesy except by a special custom of the manor (f).

When the heir succeeds to a freehold estate in respect of which a rent is payable—called a *quit rent*—a relief of one year's quit rent will be payable by the heir; for this species of relief was not affected by the statute 12 Car. II. c. 24, which abolished other kinds of relief formerly payable on the succession of the heir to lands of freehold tenure (g).

Where the heir succeeds to a copyhold estate he has the right to be admitted tenant by the lord of the manor, and, on admittance, he is bound to pay to the lord the customary

(a) Wms. Real Prop. p. 438, 16th ed.

(b) 3 & 4 Will. IV. c. 105; *Smith v. Adams*, 18 Beav. 499; 5 De Gex, M. & G. 712.

(c) Wms. Real Prop. p. 266, 16th ed.

(d) *Ibid.*

(e) *Ibid.* p. 267.

(f) *Ibid.* p. 438.

(g) *Ibid.* p. 149.

fine. The legal position of the heir in respect of the copyhold estate *before* admittance has been thus explained:—

“The heir is tenant by copy immediately upon the death of his ancestor: not indeed to all intents and purposes, for he cannot be sworn on the *homage*, that is, as one of the tenants present at the lord’s court, as tenant; but to most intents the law taketh notice of him as a perfect tenant of the land, instantly upon the death of his ancestor. He may enter into the lands before admittance; may take the profits; may punish any trespass done upon the land; may devise the land descended on him; may, upon satisfying the lord for his *fine* due upon the descent, surrender into the hands of the lord to whatever use he pleases. For which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine; and not so much necessary for the strengthening and completing of the heir’s title” (*h*).

But in case the heir does not apply for admittance, the lord, after making due proclamation at three consecutive courts of the manor for any person having right to the property to claim it and be admitted, is entitled to seize the lands into his own hands *quousque*, as it is called, *i. e.*, until some person claims admittance; and, by the special custom of some manors, if after due proclamation no one claims admittance, the lord is entitled to the lands absolutely (*i*). However, in order to prevent the rights of infants, married women, lunatics and idiots, who may be entitled to admittance, from being lost or prejudiced in consequence of their inability to appear and claim admittance, it has been provided by statute (*k*), that such persons may appear either in person or by their guardian, attorney, or committee, as

(*h*) 1 Steph. Com. p. 639, 10th ed.

(*i*) Wms. Real Prop. p. 431,  
16th ed.

(*k*) 11 Geo. IV. & 1 Will. IV.  
c. 65; 16 & 17 Vict. c. 70, ss. 108  
*et seq.*

the case may be (*l*); and in default of such appearance the lord or his steward is empowered to appoint any fit person to be attorney for that purpose only, and by such attorney to admit every such infant, married woman, lunatic or idiot, and to impose the proper fine (*m*). If the fine be not paid, the lord may enter and receive the rents until it be satisfied out of them (*n*), and if the guardian of any infant, the husband of any married woman, or the committee of any lunatic or idiot, should pay the fine, he will be entitled to a like privilege (*o*). But no forfeiture of the lands is to be incurred by the neglect or refusal of any infant, married woman, lunatic or idiot to come in and be admitted, or for their omission, denial, or refusal to pay the fine imposed on their admittance (*p*).

We will now consider the difference between the interest of a single heir and that of a coparcener. If the heir be a single person he alone will be entitled to the whole of the real estate both in his representative and individual capacity; if several persons be entitled to succeed as heirs, they constitute in their representative capacity but one person, but in their individual capacity each is entitled to a distinct though undivided share in the estate (*q*). In order that coparceners may obtain interests in severalty, it is necessary that a *partition* of the estate should be effected, and this may be accomplished—(1) By agreement between the coparceners (but the partition will be ineffectual unless made by *deed* (*r*)).

(*l*) 11 Geo. IV. & 1 Will. IV. c. 65, ss. 3, 4; 16 & 17 Vict. c. 70, s. 108.

(*m*) 11 Geo. IV. & 1 Will. IV. c. 65, s. 5; 16 & 17 Vict. c. 70, ss. 108, 109.

(*n*) 11 Geo. IV. & 1 Will. IV. c. 65, ss. 6, 7; 16 & 17 Vict. c. 70, s. 110.

(*o*) 11 Geo. IV. & 1 Will. IV. c. 65, s. 8; 16 & 17 Vict. c. 70, s. 111.

(*p*) 11 Geo. IV. & 1 Will. IV. c. 65, s. 9; 16 & 17 Vict. c. 70, s. 112; Wms. Real Prop. p. 443, 15th ed.

(*q*) Co. Litt. 163, 164.

(*r*) 8 & 9 Vict. c. 106, s. 3.

(2) By an action for partition in the Chancery Division of the High Court. (3) By application to the Land Commissioners for England, who are empowered by recent Acts of Parliament to make orders under their hands and seal for the partition and exchange of lands and other hereditaments, which orders are effectual without any further conveyance or release (*s*). But a coparcener may, before severance, devise his share by will, or sell it, and in case he dies intestate, it will pass to his heir.

Until recently the heir succeeded to all real property which was vested in the intestate by way of mortgage (*t*) just as he succeeded to all other real estate, while the right to receive payment of the mortgage debt passed, like the right to other debts, to the administrator. Accordingly, when the mortgage debt was paid off, the heir was the only person who could re-convey the property to the mortgagor, and, although he could of course be compelled to do so, yet much inconvenience was often occasioned and expense incurred before a re-conveyance could be obtained—*e. g.*, the heir might have gone to a foreign country, and it might be uncertain whether he was dead or alive. However, by a recent Act, it has been provided (*u*) that in all cases of death after the 31st December, 1881, the personal representatives of a sole mortgagee of real property shall succeed to it “as if the same were a chattel real,” *i. e.*, just as if it had been personal property.

(*s*) Wms. Real Prop. p. 163,  
16th ed.

(*t*) As to the nature of a mortgage, see *ibid.*, Pt. IV., Chap. II.

(*u*) 44 & 45 Vict. c. 41, s. 30.

## CHAPTER III.

RIGHTS AND OBLIGATIONS OF THE HEIR AND ADMINISTRATOR  
*INTER SE.*

THE fact that the heir succeeds to the real estate and to some obligations, while the administrator succeeds to the personal estate and to other obligations, gives rise to certain rights and obligations of the heir and administrator *inter se*, the more important of which we will now briefly consider. They relate to (1) contracts for the purchase or sale of real estate, (2) the payment of debts, (3) the apportionment of rent, and (4) the right to emblements.

1. *Contracts for the Purchase or Sale of Real Estate.*

## (1) Contracts for the purchase of real estate.

When a binding contract for the purchase of real estate has been entered into, we have seen that it operates as an equitable conversion of the purchase-money into real estate. Accordingly, if the purchaser died intestate before the contract had been completed by payment of the purchase-money and conveyance of the estate, his heir was formerly entitled to have the estate paid for by the administrator out of the personal estate. And if the heir had paid the purchase-money out of his own pocket, he was entitled to call upon the administrator to reimburse him (*a*). But a recent statute provides (*b*) that the heir must pay the purchase-money out of his own pocket *in case the intestate has died since the 31st December, 1877*; if, therefore, the administrator has paid for the land, he can compel the heir to reimburse him.

(*a*) 2 Wms. Exors. p. 1769,      (*b*) 40 & 41 Vict. c. 34.  
8th ed.

## (2) Contracts for the sale of real estate.

A binding contract for the sale of real estate produces, as we have seen, an equitable conversion of the real estate into money (*c*). Accordingly, if the vendor die intestate before the completion of the contract, his administrator will be entitled to receive the purchase-money, and the heir, to whom the legal estate in the property will have descended, can be required to execute a proper conveyance to the purchaser. As to the conveyance, it is now provided by the Conveyancing and Law of Property Act, 1881 (*d*), that "Where at the death of any person there is subsisting a contract enforceable against heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general in any lands, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract"; but such a conveyance "shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate" (*e*). The Act only applies where the death occurred after the 31st December, 1881 (*f*).

2. *The payment of Debts.*—It is "a well-known rule, that, as between the real and personal representatives of all persons deceased, the personal estate in the hands of the executor or administrator is the primary and natural fund which must be resorted to in the first instance for the payment of debts of every description contracted by the testator or intestate" (*g*). In the case of simple contract debts, the creditor, as we have seen, is bound in the first place to demand payment from the personal representatives, and, until all the personal estate be exhausted, he has no remedy against the real representatives;

(*c*) 1 Wms. Exors. p. 665, 8th ed.

(*d*) 44 & 45 Vict. c. 41, s. 4 (1).

(*e*) Sect. 4 (2).

(*f*) Sect. 4 (3).

(*g*) 2 Wms. Exors. p. 1699, 8th ed.

consequently, as regards the payment of simple contract debts, there is no difference between the obligations of the real and personal representatives *inter se* and their obligations to the creditors. But in those cases where, as we have seen, the real representatives are bound by the specialty debts of the deceased, the creditor may sue either the heir or the administrator of the intestate for payment of the debt, and the heir, if sued, will be bound to pay, although there may be sufficient personal assets to satisfy the debt. To such cases the rule just stated applies, and accordingly the heir will be entitled to have the amount of the debt repaid to him by the administrator.

Formerly the same rule also applied in all cases where the deceased had mortgaged his land, or there was a lien upon it for unpaid purchase-money. Accordingly, where the heir of the deceased had been forced to pay the mortgage debt, or to pay off the lien, by the mortgagor or vendor, he was entitled to be reimbursed the amount out of the personal estate. But in order that the heir might acquire this right the debt must have been the proper debt of the deceased, that is, it must have been incurred by him or adopted by him; thus, if the deceased bought land subject to an existing mortgage, or if he succeeded to land subject to a mortgage as heir-at-law or devisee, and died leaving the debt unpaid, in either case the debt must be paid out of the land, and not out of the personal estate of the deceased (*h*), unless the deceased had adopted the debt as his own (*i*). The old law still holds good in all cases of mortgages and liens which do not fall within the following statutes.

By Locke King's Act (*j*) it is provided (*k*) that "when any person shall, after the 31st of December, 1854, die seised

(*h*) 2 Wms. Exors. p. 1703, 8th ed.

to *Duke of Ancaster v. Mayer*, 1 L. C. Eq. 712, 5th ed.

(*i*) As to acts which amount to an adoption of a debt, see notes

(*j*) 17 & 18 Vict. c. 113.  
(*k*) Sect. 1.



of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will, deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof;" but it is provided that nothing in the Act shall affect or diminish the *rights of the mortgagee* to obtain payment out of the personal estate of the deceased; and it is further provided that nothing in the Act shall affect the rights of any person claiming under or by virtue of any will, deed, or document then already made or to be made before the 1st January, 1855. By 30 & 31 Viet. c. 69, s. 2, the word "mortgage" in Locke King's Act was to be deemed to extend to any *lien* for unpaid purchase-money upon any lands or hereditaments purchased by a *testator*. Accordingly a lien on lands purchased by a person who died intestate was not within the Act, and the heir could require it to be paid off out of the personal estate. It was held, too, that the Acts did not affect leaseholds for years (*k*). However, a recent Act (*l*) has provided that these Acts shall, in the case of any testator or intestate dying after the 31st December, 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure (*m*) which

(*k*) And so a legatee of leaseholds, subject to a mortgage, was entitled to have the mortgage paid off out of the other personal

estate, see *post*, p. 246.

(*l*) 40 & 41 Vict. c. 34.

(*m*) This included leaseholds.

shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage or any other equitable charge, including any lien for unpaid purchase-money; and the devisee, or legatee, or heir, shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he shall, within the meaning of the said Acts, have signified a contrary intention (*m*).

3. *Apportionment of Rent*.—At common law there was no apportionment of rent, for rent was held not to accrue due, like interest, *de die in diem*, but only to become payable after the full period had elapsed on the expiration of which it was made payable (*n*). If, therefore, a lessor died during the interval between two rent days, his personal representatives would not be entitled to a proportion of the rent up to the time of his death, but the whole of the rent which accrued during the whole of such interval went to the real representatives, or (if the lessor's interest terminated with his life) to the remainderman. The statute 4 & 5 Will. IV. c. 22, provided that the personal representatives of the lessor should be entitled to a proportionate part of the rent up to the time of the lessor's death (provided the lease was in *writing*); but it was held that this statute did not apply as between the real and personal representatives of a lessor whose interest did *not terminate with his death*; if, therefore, the lessor had a fee simple estate in the land leased, and died intestate, his heir would have been entitled to the whole rent (*o*). However, the Apportionment Act, 1870 (*p*), now provides that after the passing of that Act (*i. e.*, 1st August, 1870) *all rents* shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accord-

(*m*) See *post*, p. 249.

(*o*) *Brown v. Amyot*, 3 Hare,

(*n*) *Clun's Case*, 10 Co. 26 a; 173.

Tudor's L. C. 284, 3rd ed.

(*p*) 33 & 34 Vict. c. 35.

ingly (*q*). It also provides that the whole of the rent shall be recovered and received by the heir, or other person who would have been entitled to it, if it had not been apportionable; and the apportioned part shall be recoverable from such heir, &c. (*r*).

4. *Emblements*.—"The vegetable chattels so named are the corn and other growth of the earth, which are produced annually, not spontaneously, but by labour and industry, and therefore are called *fructus industriales*. When the occupier of the land, whether he be the owner of the inheritance or of an estate determining with his own life, has sown or planted the soil with the intention of raising a crop of such a nature, and dies before harvest time, the law gives to his executors or administrators the profits of the crops, *Emblavence de bled*, or emblements, to compensate for the labour and expense of tilling, manuring, and sowing the land. . . . The doctrine of emblements extends not only to corn and grain of all kinds, but to everything of an artificial and annual profit, that is produced by labour and manurance; as hemp, flax, saffron, and the like, and melons of all kinds; and hops also, although they spring from old roots, because they are annually manured and require cultivation" (*s*). But neither trees, nor fruit growing upon trees, are emblements, although the deceased planted the trees, "for the general rule is *quidquid plantatur solo, solo cedit*; and when a man plants a tree he cannot be presumed to plant it in contemplation of any present profit, but merely with a prospect of its being useful to him in future, and to future successions of tenants" (*t*).

The only exception seems to be the case of trees and shrubs being planted by gardeners and nurserymen *with an express view to sale*, for these belong to their personal representatives as emblements (*t*).

(*q*) Sect. 2.

(*r*) Sect. 4.

(*s*) 1 Wms. Exors. p. 716, 8th ed.

(*t*) *Ibid.*, p. 717.

Again, a crop of growing grass, although the produce of seed sown by the deceased, cannot be taken as emblements, because it cannot be distinguished from the natural produce of the soil (*x*) ; but it seems that crops of artificial grasses, as clover and saint-foin, would be considered emblements (*x*).

When the administrator has a right to emblements, he has a right also to enter upon the land for the purpose of cutting and carrying them away (*y*).

(*x*) 1 Wms. Exors. p. 718, 8th ed.

(*y*) *Ibid.*, p. 725.

## CHAPTER IV.

## THE SUCCESSION TO DECEASED EXECUTORS, ADMINISTRATORS, AND TRUSTEES WHO DIE INTESTATE.

I. *Where the Deceased was an Executor or Administrator.*

1. Where two or more persons are co-executors or co-administrators, and one dies, the survivor or survivors will become by survivorship entitled to carry on the whole administration, just as if the survivor had been appointed sole executor or administrator, or the survivors alone had been appointed co-executors or co-administrators.

2. Where a person is sole executor or administrator and dies intestate, his rights and obligations as executor or administrator will devolve, in the case of an executor, upon an administrator *cum testamento annexo de bonis non administratis* (a), and in the case of an administrator upon an administrator *de bonis non administratis*, which administrators, as we have seen, will be appointed by the Probate Division (b).

II. *Where the Deceased was a Trustee.*

In the first place it will be necessary to state very briefly the manner in which trusts may be created.

Trusts may be divided into two classes: (1) *express* trusts, and (2) *implied* trusts (c).

(1) Express trusts, as the name imports, are trusts which

(a) *Post*, p. 230.

(b) *Supra*, p. 82.

(c) "Implied trusts," "constructive trusts," "trusts by ope-

ration of law," appear from the authorities to be almost synonymous terms. See Lewin, *Trusts*, p. 108, n., 8th ed.

are created by *express declaration of intention* to create a trust, whether such declaration be made in a deed, or will, or other writing, or sometimes simply by word of mouth. Thus if A. conveys or assigns property to B. by deed, and declares, either in the deed, or by a separate document, or, in the case of *chattels personal*, by parol (*d*), that B. shall hold the property in trust for C., an express trust for the benefit of C. will be thereby created.

(2) Implied trusts are trusts which arise where there is no express declaration of trust, but an intention to create a trust can be implied by the Courts from the words used with reference to the holding, or acquisition, or transfer of property, whether *inter vivos* or by will, or from the circumstances under which property is acquired or transferred, or from both, or where in the opinion of the Court it would be inequitable or contrary to public policy that a person who has acquired the legal right to property should be allowed to enjoy the beneficial interest.

*E. g.*, where a testator devises an estate to A. "*not doubting*": he will thereout pay an annuity of 20*l.* to B. for life, A. will be a trustee for B. to the extent of the annuity (*e*), an intention to create a trust being implied from the words "*not doubting*."

So, where an estate is devised to A. and his heirs upon trust to sell and pay the testator's debts, A. will be a trustee of any surplus which remains after paying the debts for the heir of the testator (*e*); for the object of the devise is the payment of the testator's debts, and not the benefit of A.

So, where A. sells and conveys land to B., but the purchase-money is advanced by C., B. will hold the lands as trustee for C. until he has repaid the purchase-money to C. (*f*).

(*d*) Snell's Equity, p. 53, 8th ed.

(*f*) See *Dyer v. Dyer*, 2 Cox,

(*e*) Lewin, Trusts, p. 108, n.,  
8th ed.

29; 1 L. C. Eq., p. 223, 5th ed.

So, where a trustee of leasehold property obtains a renewal of the lease for his own benefit, he will be regarded as merely a trustee of the renewed lease for the benefit of the persons who are interested in the old lease (*g*), it being contrary to public policy that a trustee should be allowed to make any profit or advantage for himself out of the trust property.

In dealing with the succession to the rights and obligations of trustees, it is important to distinguish between the office of the trustee and his *legal* rights *in rem* over the trust property. At law he is regarded as the absolute owner of the property, the office of trustee is merely a creation of equity.

The rules governing succession to the office of trustee and the trust property may be summarised as follows :—

#### A. *Express Trusts.*

1. Where the deceased was one of several trustees.

(1) *Trust Property*.—Trustees are in law joint tenants of the trust property; therefore, on the death of one trustee, the legal right to the property becomes vested in the survivor or survivors. As the survivor already had a right to the property, he cannot take by succession; he is said to take by survivorship.

(2) *The Office of Trustee*.—The office of trustee vests by survivorship in the surviving trustee or trustees, who will have the right to carry on the trust and exercise all such powers as may be necessary for the purpose.

But to this rule there is an exception in case a contrary intention was expressed when the trust was created. If, for instance, it was intended that the trust should only be exercised by *three* trustees, and one dies, the trust cannot be carried on until a new trustee has been appointed, who in this case may be said to succeed to the office of the deceased trustee (*h*).

(*g*) *Keech v. Sandford*, Sel. Ch. Ca. 61; 1 L. C. Eq., p. 46, 5th ed.

(*h*) See, as to appointment of new trustees, Wms. Real Prop. pp. 199 *et seq.*, 16th ed.

Where the trust was personal to the trustees taken collectively, the death of one of course extinguishes the trust; *e. g.* a conveyance of land to A., B., and C. in trust to sell, with an express declaration that the trust shall not be exercised by the survivor or survivors (*i*). In these cases the surviving trustee or trustees will hold the property on an implied trust for the persons who may be able to prove their title to the beneficial interest in the property. Thus, the original express trust is extinguished and a new trust is implied from the circumstances of the case.

2. Where the deceased was sole trustee, or sole surviving trustee.

(1) *Trust Property.*

(a) In case of death *before* January 1st, 1882, the heir succeeds to real property; the administrator to personal property.

(b) In case of death on or after January 1st, 1882, the Conveyancing and Law of Property Act, 1881 (*k*), provides that the personal representatives shall succeed to *all trust property, whether real or personal*.

If the trust was extinguished by the death of the trustee, his heir, or devisee, or personal representatives will hold the property on an implied trust for the persons beneficially entitled to it; and in case the office of trustee does not pass with the property, the heir or devisee, &c. will hold in trust to convey or assign the property to the new trustee.

(2.) *The Office of Trustee.*—The succession to the office of trustee depends upon the intention expressed when the trust was created; it may be that the personal representatives or heir of the deceased trustee was intended to succeed him, or, as often happens, a new trustee must be appointed by a person to whom the right of appointing a new trustee is given; for instance, if property be vested in A. in trust for a

(*i*) Lewin, *Trusts*, p. 395, 7th ed. (*k*) 44 & 45 Vict. c. 41, s. 30.



husband and wife for life, and after their death in trust for their children, the right of appointing new trustees may be given to the husband and wife and to the survivor of them. And by a recent Act (*l*), it is provided that where no person is authorized by the instrument creating the trust to appoint new trustees, or where a person has been authorized but is unwilling or incapable of acting, the personal representatives of the last surviving or continuing trustee may by writing appoint a new trustee or trustees. The provisions of this Act are expressly made subject to the terms of the instrument creating the trust.

### B. *Implied Trusts.*

#### 1. Where the deceased was one of several trustees.

The surviving trustee or trustees are entitled by survivorship to the whole trust property and the office of trustee.

#### 2. Where the deceased was sole trustee or sole surviving trustee.

In all cases of implied trusts the office of trustee passes with the legal interest in the trust property. In case of death before the 1st January, 1882, the heir of the deceased trustee succeeds to real property, the administrator to personal property; but in case of death on or after that date, the administrator will, it seems, succeed in every case, whether the property be real or personal (*m*).

It must be observed that an administrator, or executor, or trustee, incurs no personal liability so long as he discharges the duties of his office with due care and diligence, but he is personally responsible for any loss resulting from his negligence or from his misapplication of the trust property, or from any other improper conduct relating to the trust. Any such wrongful act or omission is called a "*devastavit*," when

(*l*) 44 & 45 Vict. c. 41, s. 31. Prop. pp. 201 *et seq.*, 16th ed.  
The earlier statutes on the subject (m) 44 & 45 Vict. c. 41, s. 30.  
are referred to in Wms. Real

the guilty party is an executor or administrator, a “*breach of trust*” when he is a trustee; and the obligation to make good the loss to the persons beneficially entitled to the trust property is binding upon the real and personal representatives of the person who has committed the breach of trust or *devastavit* (*n*), in the same manner as his simple contract obligations incurred in his private capacity (*o*).

(*n*) As to trustees, *Mountford* administrators, 4 Will. & M. c. 24,  
v. *Cadogan*, 17 Ves. 485; as to s. 12.  
representatives of executors and (*o*) *Supra*, p. 79.

## PART IV.

## THE LAW OF TESTAMENTARY SUCCESSION.



WHERE a person dies *testate*, that is, when he has made a valid will and dies without having revoked it, the devisee or devisees will succeed to all the real estate devised by the will, and also to the obligations which are binding upon real representatives (*a*) ; the executor or administrator *cum testamento annexo* will succeed to all the personal estate bequeathed by the will, even though such personal estate be given specifically to the legatees, and to all the obligations which are binding upon personal representatives (*b*). The heir-at-law will succeed to all real estate which is not devised by the will, or the devise of which has failed to take effect, for as to that portion of the real estate the testator will have died intestate ; so an administrator, appointed as in cases of total intestacy, will succeed to all personal estate which has not been bequeathed by the will so as to pass to the executor (*c*). The succession of the heir and administrator in these cases is of course governed by the law of intestate succession which we have just been discussing, and we are not, therefore, further concerned with them here.

In dealing with the subject of testamentary succession it is obvious that we must, in the first place, inquire what are the

(*a*) See *supra*, Pt. II., Chap. III.

(*b*) *Ibid.*

(*c*) The rule is, however, that all personal estate passes to the

executor, unless his authority be expressly limited by the will to a certain portion only.

essentials of a valid will. We must next deal separately with the two main branches into which the subject, as we have seen, naturally falls, namely, the succession of the executor or administrator *cum testamento annexo*, and the succession of the devisee or devisees. It will then be convenient to discuss shortly certain rights and obligations of the devisee and executor, or devisee, heir, and executor, *inter se*, which arise from the conflicting interests of these representatives of the testator ; and afterwards we shall refer to the succession to deceased executors, administrators, and trustees who have died testate.

Accordingly the whole subject of the law of testamentary succession will be dealt with under the following heads :—

1. The essentials of a valid will.
2. The succession of the executor.
3. The succession of the administrator *cum testamento annexo*.
4. The succession of the devisee.
5. Rights and obligations of the devisee and executor, or devisee, heir, and executor *inter se*.
6. The succession to deceased executors, administrators, and trustees who have died testate.

## CHAPTER I.

## THE ESSENTIALS OF A VALID WILL.

THE essentials of a valid will may be stated as follows :—

1. The will must be expressed in the form required by law.
2. The testator (*a*) must have capacity to make a will.
3. The will expressed in the form required by law must be the genuine will of the testator.
4. The provisions contained in the will must not be contrary to law.
5. The persons to whom interests are given under the will must be capable of acquiring such interests by will.
6. The will must remain unrevoked at the time of the testator's death.

It must be observed that 1, 2, and 6, go to the root of the whole will, *i.e.*, if the will be *not* in the form required by law, or if the testator have *not* capacity to make a will, or if at the time of his death the will be revoked, the will is absolutely void and the testator dies intestate. But the other essentials do not always go to the root of the whole will, *e.g.*, if a will contain one or two provisions which are contrary to law, and others which are perfectly lawful, the former provisions will alone be void, and the latter will take effect.

(*a*) We will use "*testator*" as the context shows that it is limited including a "*testatrix*," unless to a male.

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SECTION I.—*The Will must be expressed in the Form required by Law.*

The common law never seems to have required that wills should be made in any particular form: if a will were made by word of mouth—in which case it was called a *nuncupative* testament—it was, of course, necessary that it should be made in the presence of witnesses, otherwise there would have been no means of proving that a will had been made; but if made in writing no witnesses were necessary, nor was it even necessary that the testator should have signed the writing, provided it could be shown that he intended it to take effect as his will. The Statute 32 Hen. VIII. c. 1, which enabled persons to dispose of all their land held by socage tenure, and of two-thirds of that held by knight's service, by will, required such will to be made "in writing," but neither attesting witnesses nor signature were necessary.

Important alterations were subsequently effected by the Statute of Frauds (*a*). As to wills of *real property*, it provided (*b*) that they should be utterly void and of no effect unless they were (1) in writing; (2) signed by the testator or by some other person in his presence and by his express directions; and (3) attested and subscribed in the presence of the testator by "three or four credible witnesses"; as to wills of personal property, it provided (*c*) that no nuncupative will should be good, in case the estate thereby bequeathed should exceed the value of 30*l.*, unless it were proved by the oaths of three witnesses, and unless certain other conditions were fulfilled; and after the lapse of six months from the time the will was made no testimony was to be received to prove any nuncupative will, unless such testimony or the substance thereof had been committed to writing within six days after

(*a*) 29 Car. II. c. 3, which came into force on June 20th, 1677.

(*b*) Sect. 5.

(*c*) Sect. 19.

the making of the will (*d*). But the Act did not apply to wills of personal estate made by soldiers in actual military service, or mariners or seamen being at sea (*e*).

This Act, it will be observed, had the effect of giving additional importance to the distinction between real and personal property; if, for instance, a man attempted to dispose of all his property by a will in writing which he had not signed, or which was only attested by two witnesses, it would be valid as to his personal property and absolutely void as to his real property.

The law respecting the form of wills remained unaltered until the 1st January, 1838, on which day the "Act for the amendment of the laws with respect to wills" (*f*), usually called the Wills Act, came into operation. This Act provides (*g*) that, "No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of *two* or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." It must be observed that no special form nor technical expressions are necessary in making a will; all that is required is that the will shall be in *writing*, and executed (*i.e.* signed and attested) in the manner provided by the Act. The following is an example of a will of the simplest kind (*h*).

I, John Smith, of No. , Bloomsbury Square, London, Merchant, declare this to be my last will, and I hereby devise and bequeath all my real and personal estate unto my wife, Ann Smith, absolutely, and

(*d*) Sect. 20.

(*e*) Sect. 23.

(*f*) 7 Will. IV. & 1 Vict. c. 26.

(*g*) Sect. 9.

(*h*) Davidson's Concise Precedents, p. 437, 11th ed.

I appoint her sole executrix of this my will. In witness (*h*) whereof I, the said John Smith, have to this my will set my hand this first day of May, 1887.

Signed and acknowledged by the above-named John Smith as his will in the presence of us, present at the same time, who in his presence and in the presence of each other have hereunto subscribed our names as witnesses (*i*),

JOHN SMITH.

JAMES JONES,

of No. , Lincoln's Inn Fields, London, Solicitor.

THOMAS ROBINSON,

of No. , Harley Street, London, Surgeon.

The provision in the Wills Act that the will "shall be signed at the foot or end thereof" gave rise to a considerable amount of litigation, and in 1852 an Act (*k*) was passed to explain that provision. By this Act it is enacted (*l*) that "every will shall, *so far as regards the position of the signature* of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment (*m*), as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed amongst the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names

(*h*) This is called the *testimonium* clause.

(*i*) This is called the *attestation* clause.

(*k*) 15 & 16 Vict. c. 24.

(*l*) Sect. 1.

(*m*) *I. e.*, the Wills Act.



or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act (*n*) or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

The Wills Act further provides that, "no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will" (*o*).

Alterations in a will are, however, usually effected by the execution of a codicil to the will, and by the Wills Act all codicils are required to be executed in the same manner as wills (*p*). For instance, suppose John Smith a few days after

(*n*) *I. e.*, the Wills Act.

(*p*) Sect. 1 provides that "will"

(*o*) 7 Will. IV. & 1 Vict. c. 26, shall extend to "a codicil."

executing the will given on p. 157, *supra*, wished to leave a legacy of 50*l.* to his brother William Smith, he could carry out his wish by supplementing his will with a clause to that effect, signed by him and witnessed just in the same manner as if he were executing a new will.

The Wills Act expressly provides that “any soldier being *in actual military service*, or any mariner or seaman *being at sea* may dispose of his personal estate as he might have done before the making” of the Act (*q*). But the wills of mariners and seamen are in some cases required to be executed in a particular manner by special statutes. By 28 & 29 Vict. c. 72 (*r*), the wills of petty officers and seamen in the Royal Navy, and of marines and non-commissioned officers of marines, *so far as relates to any wages, pay, prize-money, or other moneys payable by the Admiralty*, are required to be in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea; and when the will is made on board one of her Majesty’s ships, one of the two attesting witnesses must be a commissioned officer, chaplain, or warrant or subordinate officer belonging to her Majesty’s naval or marine or military forces. When the will is made elsewhere, one of the two witnesses must be such an officer, &c., as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public (*s*). But in case a seaman or marine is a prisoner of war, his will will be valid to pass wages, &c., if it be in writing, signed by him in the presence of and attested by one witness, being either a com-

(*q*) Sect. 11.

1 Will. IV. c. 20.

(*r*) Superseding 11 Geo. IV. &

(*s*) Sect. 5.

missioned officer, or chaplain belonging to her Majesty's naval or marine or military force, or a warrant or subordinate officer of her Majesty's navy, or the agent of a naval hospital, or a notary public (*t*); or if it be executed in accordance with the formalities required by the law of England in the case of other persons not being soldiers in military service, &c.

If this Act be not complied with, it is discretionary with the Admiralty whether they pay the wages, &c. to persons claiming under the will (*u*).

And by the Merchant Shipping Act, 1854 (*v*), it is provided that the Board of Trade may, in its discretion, refuse to pay or deliver *the wages or effects* of any deceased merchant seaman to any person claiming to be entitled thereto under any will made on board ship, unless such will be in writing and signed or acknowledged by the testator in the presence of the master or first or only mate of the ship, and be attested by such master or mate. And the Board may, in its discretion, refuse to pay or deliver any such wages or effects to any person, not being related to the testator by blood or marriage, who claims to be entitled thereto under a will made elsewhere than on board ship, unless such will be in writing, signed or acknowledged by the testator in the presence of two witnesses, one of whom is some shipping master appointed under the Act, or some minister, or officiating minister or curate, of the place in which the same is made, or, in a place where there are no such persons, some justice of the peace, or some British consular officer, or some officer of customs, and be attested by such witnesses.

Formerly a will of personal estate was in no case valid unless it had been made in the form required by the law of the country where the testator was domiciled at the time of his death. A person's domicil is the place which he makes

(*t*) 28 & 29 Vict. c. 72, s. 6.

(*v*) 17 & 18 Vict. c. 104, s. 200.

(*u*) Sect. 7.

his home; but if it does not appear that he has made any particular place his home, then the country where he was born, or which was the domicile of his parents, will be his domicile (*x*). If, then, A. had acquired a domicile in France, and while on a visit to England made his will and died in England, the question whether the will was valid or not would have been determined according to the law of France. But this rule only applied to wills of *personal* property; *real* property can only pass under a will which is made in accordance with the law of the country where the property is situated (*y*)—the *lex loci rei sitæ*; so, in the above case, if A. had real property in England, such property would not pass by his will unless the will were made in accordance with the law of England. The law has been altered, as to wills of personalty made by *British subjects*, by an Act (*z*) of the present reign, which provides (*a*) that “Every will and other testamentary instrument made *out of* the United Kingdom by a *British subject* (*whatever may be the domicile of such person at the time of making the same or at the time of his or her death*) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate (*b*), and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty’s dominions where he had his domicile of origin”; and that “Every will and other testamentary instrument made *within* the United Kingdom by any

(*x*) Foote, Private Int. Jurisprudence, p. 9; 2 Wms. Exors. p. 1523, 8th ed., where the rules for ascertaining the domicile are fully stated.

(*y*) *Ibid.* p. 155.

(*z*) 24 & 25 Vict. c. 114.

(*a*) Sect. 1.

(*b*) See, as to probate, *post*, p. 207.

*British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England or Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made" (c).* And it is provided that "no will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same" (*d*). The Act only applies to wills of persons who die after the 6th August, 1861 (*e*).

We have seen that the Statute of Frauds required three or four "credible" witnesses, and as the law "had so great a dread of the evil influence of the love of money that it would not even listen to any witness who had the smallest pecuniary interest in the result of his own testimony" (*f*), it followed that a bequest to a witness, or to the wife or husband of a witness, would render a will void; for the testimony not being admissible, there would not be the requisite number of witnesses required by law; 25 Geo. II. c. 6, made gifts to witnesses void and rendered the witnesses credible, but that Act did not apply to gifts to husbands and wives of witnesses. The law on this point has been altered by the Wills Act, which provides:—

1. That the incompetency of a witness at the time of the execution of the will, or at any time after, shall not render the will void (*g*).

2. That a witness to whom, or to whose wife or husband,

(c) 24 & 25 Vict. c. 114, s. 2.

(d) Sect. 3.

(e) Sect. 5.

(f) Wms. Real Prop. p. 240,  
16th ed.

(g) Sect. 14.

a beneficial interest is given by the will shall be a competent witness, but the gift of such beneficial interest (except charges or directions for the payment of any debt or debts), shall be utterly null and void (*h*).

3. That a creditor, or the husband or wife of a creditor, whose debt is charged by the will upon any real or personal estate, shall be a competent witness (*i*).

4. The person appointed executor of a will is a competent witness (*k*).

Formerly, when a testator wished to devise copyholds, it was necessary that he should first make a surrender of the property to the use of his will, and the will then formed part of the surrender, and was not required to be executed or attested in any particular form ; but by an Act (*l*) passed in 1815, a devise of copyholds without any surrender to the use of the will was made as valid as if a surrender had been made. Wills of copyholds must now be executed and attested in the same manner as other wills (*m*). And a surrender to the use of the will is still unnecessary.



## SECTION II.—*The Testator must have Capacity to make a Will.*

Every person is capable of making a will, unless specially incapacitated by reason of (1) immaturity of age ; (2) coverture ; (3) unsoundness of mind ; or (4) civil death. We must, therefore, inquire how far the capacity to make a will is restricted on each of these different grounds.

I. *Immaturity of age*.—Until a person attained a certain age the common law always treated him as too deficient in

(*h*) Sect. 15.

(*i*) Sect. 16.

(*k*) Sect. 17.

(*l*) 55 Geo. III. c. 192.

(*m*) 7 Will. IV. & 1 Vict. c. 26,  
s. 3.

mental capacity to make a will. The age at which this incapacity was presumed to cease appears to have been twelve years in the case of females, and fourteen in the case of males (*n*) ; but even after that age, it seems that a person could not make a valid will unless it appeared that he had capacity to understand the act he did (*o*).

As to wills of real property, it was provided by 34 & 35 Hen. VIII. c. 5, s. 14, that they should not be "taken to be good or effectual in the law" if made by persons within the age of twenty-one years. And this is the limit now fixed by the Wills Act (*p*), whether the property be real or personal. That Act expressly provides that *no will made by any person under the age of twenty-one years shall be valid*. Accordingly, there is now only one case in which an infant, *i. e.*, a person under the age of twenty-one, can make a valid will, namely the case of an infant being a soldier in actual service, or a mariner or seaman at sea; for we have seen (*q*) that the Wills Act expressly provides (*r*) that these persons may dispose of *personal estate* as they might have done before the passing of the Act, and so in these cases the common law limit as to age still applies (*s*).

II. *Coverture*.—In dealing with the incapacity of coverture, we must divide married women into two classes—

A. Women married *before* the 1st January, 1883.

B. Women married *on or after* the 1st January, 1883.

This classification is rendered necessary in consequence of the important alterations in the status of married women effected by the Married Women's Property Act, 1882.

(*n*) 2 Bl. Com. 497.

(*q*) *Supra*, p. 160.

(*o*) *Ibid.*; *Arnold v. Earl*, 2

(*r*) Sect. 11.

Lee, 529.

(*s*) *Re McMurdo*, L. R. 1 P. &

(*p*) 7 Will. IV. & 1 Vict. c. 26,

M. 540.

s. 7.

A. *Testamentary Capacity of Married Women whose Marriage took place before the 1st January, 1883.*

A married woman, during the time the coverture lasts, is, by common law, totally incapable of making a valid will of personal property without the licence of her husband, and, even if she does so with his consent, he may withdraw his consent during her lifetime, or at any time before probate of the will, and thereupon the will becomes absolutely void. As to real estate, 34 & 35 Hen. VIII. c. 5, s. 14, provided that the will of any woman covert should not be taken to be good or effectual in the law, and thus removed the doubt as to whether 32 Hen. VIII. c. 1, which permitted land to be devised by will (*t*), enabled married women to make wills of real estate. The incapacity to make wills of personal estate was the consequence of the common law doctrine that husband and wife were one person in the eye of the law; from which it followed that the husband acquired an absolute right to all his wife's *choses in possession*, and to all *choses in action* which he reduced into possession during her lifetime, and that, in case he survived her, he was entitled as her administrator to such of her *choses in action* as he had not already reduced into possession (*u*). The common law would not allow these marital rights of the husband to be defeated without his consent; hence the rule that the will of a married woman is void unless made with the consent of her husband.

The Wills Act made no alteration in the law on this subject; it provides "that no will made by any married woman shall be valid except such a will as might have been made by a married woman before the passing of this Act" (*v*).

Accordingly the general rule is that a married woman cannot make a valid will without the licence of her husband.

To this general rule there are certain exceptions, some of which seem to have always been recognised by the common law, while the others owe their origin to equity or statute.

(*t*) *Supra*, p. 38.

(*u*) *Supra*, p. 116.

(*v*) Sect. 8.



1. *Exceptions at Common Law.*

(1) The queen consort can make a valid will.

(2) The wife of a person convicted of treason or felony can make a valid will of property which she has acquired since the date of the conviction (*v*).(3) A married woman who is an executrix can make a valid will of property to which she is entitled as executrix; but only *choses in action* passed by such a will before the Married Women's Property Act, 1882, came into operation (*x*). Probably a married woman who has become executrix since the 1st January, 1883, can by will transfer all property which she holds or is entitled to as executrix (*y*).(4) A married woman in whom a power of appointment (exercisable by will) over property is vested, can make a valid will in exercise of such power without the consent of her husband (*z*).

The reason is, that the person who exercises a power is merely regarded as the agent of the person who conferred the power (*a*).

2. *Exception created by Equity.*

A married woman can make a valid will of all property, whether real or personal, which belongs to her as her separate estate (*b*), except, of course, when by deed or will she is expressly restrained from alienating it.

As to personal property, the law seems to have been settled since 1789 (*c*); but some doubt seems to have existed with regard to real estate until 1865, when the law was laid down

(*v*) *In the goods of Martin*, 2 Robert. 405; and see *Re Coward*, 24 L. J. (N. S.) P. M. & A. 120.

(*x*) 1 Wms. Exors. p. 54, 8th ed.

(*y*) Cf. Wolstenholme's Conv. Acts, p. 161, 3rd ed.

(*z*) 1 Wms. Exors. p. 56, 8th ed.

(*a*) See Sug. Powers, 153, 8th ed.

(*b*) As to what property is separate property, independently of statute, see Snell's Equity, p. 424, 8th ed.

(*c*) *Fettiplace v. Gorges*, 1 Ves. jun. 46.

by Lord Westbury in the case of *Taylor v. Meads* (d) as follows :—

“ When the courts of equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a *feme sole*. It is of the essence of the separate use that the married woman shall be independent of, and free from the control and interference of, her husband. With respect to separate property the *feme covert* is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris*, the common law attaches a right of alienation; and accordingly the right of a *feme covert* to dispose of her separate estate was recognised and admitted from the beginning, until Lord Thurlow devised the clause against anticipation” (e).

He then explains that the courts of equity considered 34 & 35 Hen. VIII. c. 5 (which made wills of real estate by married women void (f)), “ as not applicable to separate estate, which was unknown at the time of the passing of the statute” (g); and after referring to earlier authorities, finally comes to the conclusion that “ a *feme covert*, not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation by instrument *inter vivos* or by will” (g).

### 3. *Exceptions created by Statute.*

(1) The Divorce and Matrimonial Causes Act, 1857 (h).

(a) A woman divorced from her husband ceases to be a married woman, and her incapacity to make a will ceases also.

(d) 34 L. J. Ch. 203, 207.

(f) *Supra*, p. 166.

(e) See *Parkes v. White*, 11 Ves. 209, 221.

(g) *Taylor v. Meads*, at p. 208.

(h) 20 & 21 Vict. c. 85.

(b) A woman judicially separated from her husband may dispose *as a feme sole* of all property which she may acquire *after* the date of the sentence of judicial separation, and if she renews cohabitation all such property “*shall be held to her separate use*” (*i*), so that she may still dispose of it by will.

(c) A woman who has been deserted by her husband and has obtained a protection order is entitled to her earnings and other property acquired since the commencement of the desertion “*as if she were a feme sole,*” and during the continuance of the desertion is in the like position as a woman who has been judicially separated (*k*).

(2) 41 Vict. c. 19, s. 4.

A *séparation* order made in cases where a husband has been convicted of aggravated assault has the effect of a judicial separation.

(3) The Married Women’s Property Act, 1870 (*l*). This Act provided that certain property of a married woman should be *deemed to be her separate property*. Thus, by creating statutory separate estate, the Act indirectly extended the power of married women to dispose of their property by will without the consent of their husbands; for, as we have seen, a married woman could make a valid will of separate estate without her husband’s licence.

The Married Women’s Property Act, 1870, made the following kinds of property separate estate:

(a) Where the marriage took place either *before or after* the passing of the Act (*m*)—

(i) The wages and earnings, money or property, of a married woman acquired or gained by her after the 9th August, 1870, in any employment, occupation, or trade in which she was engaged, or which she carried on separately from her husband, or through the exercise

(i) Sect. 25.

(l) 33 & 34 Vict. c. 93.

(k) Sect. 21.

(m) 9th August, 1870.

of any literary, artistic, or scientific skill, and all investments of such wages, money, earnings, and property (*n*).

- (ii) On the application of a married woman or a woman about to marry, public stock or funds (of not less than 20*l.* in value) (*o*), fully paid up shares, debentures or stock in incorporated or joint stock companies (*p*), shares, benefits, or debentures (to which no liability attached), or rights or claims to or upon the funds of any industrial, provident, or friendly society (*q*), might be entered or registered, &c. in the name of such woman, and thereupon such stock, &c. was to be deemed to be her separate estate.

(b) Where the marriage took place *after* the passing of the Act (*r*)—

- (i) All personal property to which a married woman became entitled as next of kin of an intestate (*s*) ;
- (ii) Any sum of money not exceeding 200*l.* to which a married woman became entitled under a deed or will (*s*) ;
- (iii) The rents and profits of any freehold, copyhold, or customaryhold property which descended upon a married woman as heiress (*t*).

These provisions were to be without prejudice to the trusts of any settlement affecting the property (*u*).

The Married Women's Property Act, 1870, was repealed by the Married Women's Property Act, 1882 (*x*), *except as to rights acquired before the 1st January, 1883*.

(4) The Married Women's Property Act, 1882 (*y*). Every woman married before the 1st January, 1883, shall be

(*n*) Sect. 1.

(*o*) Sect. 3.

(*p*) Sect. 4.

(*q*) Sect. 5.

(*r*) 9th August, 1870.

(*s*) Sect. 7.

(*t*) Sect. 8.

(*u*) Sects. 7, 8.

(*x*) 45 & 46 Vict. c. 75, s. 22.

(*y*) 45 & 46 Vict. c. 75.

entitled to have and to hold, and to dispose of, “*by will or otherwise*,” as her separate property, “all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, *shall accrue*” *after the 1st of January, 1883* (z), including “any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill” (a).

These provisions are subject to the terms of any agreement for a settlement, settlement, will, or other instrument affecting the property (b).

**B. Testamentary Capacity of Married Women whose Marriage took place on or after the 1st January, 1883.**

The Married Women’s Property Act, 1882 (c), provides that every woman who marries on or after the 1st January, 1883, “shall be entitled to have and to hold as her separate property,” and to dispose of, “*by will or otherwise*,” all real and personal property which,

(1) “Shall belong to her at the time of marriage”; or

(2) “Shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill” (d).

These provisions are subject to the terms of any settlement, agreement for a settlement, will, or other instrument affecting the property (e).

(z) *Reid v. Reid*, 31 Ch. D. 402.

(a) Sects. 1, 2, 5.

(b) Sect. 19.

(c) 45 & 46 Vict. c. 75.

(d) Sects. 1, 2.

(e) Sect. 19.

The Act practically confers complete testamentary capacity upon all women who have been married since the commencement of the Act.

III. *Unsoundness of Mind*.—In order that a will may be valid, the law requires that the testator, *at the time of making the will*, shall be of *sound mind*. And first of all it is important to explain what these words “a sound mind” do not mean. “They do not mean a *perfectly balanced* mind. If so, which of us would be competent to make a will? Such a mind would be free from all influence of prejudice, passion, and pride. But the law does not say that a man is incapacitated from making a will if he propose to make a disposition of his property moved by capricious, frivolous, mean, or even bad motives. We do not sit here to correct injustice in this respect” (g).

But although it is not essential that a testator should have a perfectly balanced mind, yet it is essential that he should have “what old lawyers have called a *disposing mind*” (h); that is, he must not only be able to understand that he is by his will giving his property to the objects of his regard, but must also *have capacity to comprehend the extent of his property, and the nature of the claims of others whom, by his will, he is excluding from all participation in that property* (i). In other words, it seems essential that the mind of the testator shall be capable of exercising—(1) the faculty of remembering what property he has, all material facts relating to it, the persons who have claims upon his bounty, and the nature of their claims; (2) the faculty of reasoning and forming a judgment respecting such facts, and the claims of such persons.

(g) Per Sir J. Hannen, *Boughton* 1 Fost. & F. 578.  
 v. *Knight*, L. R. 3 P. & D. 64, 66. (i) *Harwood* v. *Baker*, 3 Moo.  
 (h) *Earl of Sefton* v. *Hopwood*, P. C. C. 282, 290.

When a person has not a disposing mind he is said to be of unsound mind for the purpose of making a will, and this may arise from three chief causes—(1) the mental disease which we call insanity; (2) the decay or loss of the mental faculties, which is often the consequence of old age or bodily infirmity; and (3) intoxication.

1. *Insanity*.—Persons suffering from mental disease we call lunatics or idiots; the distinction seems to be that an idiot is “a fool or madman from his nativity who never has any lucid intervals” (*k*); a lunatic is “a person usually mad, but having intervals of reason” (*l*). Adopting this distinction, it is clear that an idiot is totally incapable of making a valid will; but a lunatic is capable in two cases.

(a) He can make a valid will during a lucid interval. The law on this point is perfectly well established, and the only question in each case is whether a lucid interval has been proved—a mere question of fact, but one which is sometimes exceedingly difficult to determine. It is always more difficult when the insanity is of a permanent nature than where it takes the form of delirium, *i.e.*, a fluctuating state of mind created by temporary excitement, in the absence of which the patient is, most commonly, really sane (*m*). In the case of a lunatic so found by inquisition, it is a presumption of law that the commission of lunacy was well founded, and, if it remains unsuspended, that the lunatic remained a lunatic until his death; and this presumption can only be rebutted by positive proof of a lucid interval or entire recovery at the time the will was executed (*n*).

(b) Where a person is suffering from partial insanity, or, as

(*k*) 1 Wms. Exors. p. 17, 8th ed.

(*l*) *Ibid.* p. 19.

(*m*) *Brogden v. Brown*, 2 Add. 445; a good instance of a lucid interval will be found in *Cart-*

*wright v. Cartwright*, 1 Phillim. 90, fully cited 1 Wms. Exors. p. 23, 8th ed.

(*n*) 1 Wms. Exors. p. 38, 8th ed.

it is called, monomania—*i.e.*, he is perfectly sane on all points save one or two—he can make a valid will provided it be satisfactorily proved that the insanity *did not affect the general faculties of the mind, and can have had no effect upon the will* (o). Thus, where a testator, at the time he made his will, was suffering from two delusions,—one that he was pursued by spirits, the other that a man, long since dead, came personally to molest him,—but in all other respects was perfectly sane, it was held that, as neither of these delusions—the dead man not having been in any way connected with him—had, or would have had any influence upon him in disposing of his property, the will was perfectly valid (p).

2. *Decay or loss of the mental faculties in consequence of old age or bodily infirmity.*

Where a testator was of great age at the time he made his will, and the will is disputed, the fact of great age “raises some doubt of capacity, but only so far as to excite the vigilance of the Court; for the law allows a person at any age to make a will, provided he retains the disposing faculties of his mind” (q). But “if a man in his old age becomes a very child again in his understanding, or rather in the want thereof, or by reason of extreme old age or other infirmity has become so forgetful that he knows not his own name, he is then no more fit to make his testament than a natural fool, or a child, or lunatic person” (r).

So in the case of bodily infirmity, the fact that the infirmity affects the mind will not render the mind unsound for the purpose of making a valid will, unless it be shown that the effect upon the mind was such as to deprive it of its disposing faculties (s).

(o) *Banks v. Goodfellow*, L. R. 5 Q. B. 549; overruling on this point *Waring v. Waring*, 6 Moo. P. C. 341.

(p) *Banks v. Goodfellow*, *supra*.

(q) *Kindleside v. Harrison*, 2 Phillim. at p. 461.

(r) Swin. Pt. 2, s. 5, pl. 1.

(s) *Harwood v. Baker*, 3 Moo. P. C. C. 282.



3. *Intoxication*.—"He that is overcome by drink, during the time of his drunkenness is compared to a madman, and therefore, if he make his testament at that time, it is void in law; which is to be understood, when he is so excessively drunk that he is utterly deprived of the use of reason and understanding; otherwise, albeit his understanding is obscured and his memory troubled, yet he may make his testament, being in that case" (t).

Drunkenness differs from insanity in this respect, that drunkenness can scarcely be latent, and therefore, in order that a will may be valid, it is only necessary to prove that at the time of its execution there was an absence of such excitement or confusion of ideas as would indicate that the mind was really affected (u).

IV. *Civil Death*.—"Civil death occurs where a man is attainted of treason or felony; for immediately upon such attainder he loses (subject indeed to some exceptions) his civil rights and capacities; and becomes, as it were, dead in law" (x). All real and personal property of such persons was forfeited to the Crown, or, as to real property, sometimes to the lord (subject to the Crown's right of possession for a year and a day (y)), and accordingly they had no property to dispose of by will (z); but it seems that the will was good except against the Crown or lord (a). By a recent Act (b) it has been provided that, after the 4th July, 1870, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony shall cause any forfeiture or escheat (c); but nothing in that Act is to "affect the law of forfeiture consequent upon *outlawry*" (c). Accordingly, where civil death has occurred

(t) Swin. Pt. 2, s. 4, pl. 3.

16th ed.

(u) *Ayrey v. Hill*, 2 Add. 206, 210.

(z) Swin. Pt. 2, §§ xii, xiii.

(a) Bac. Abr. Wills, B. 17.

(x) 3 Inst. 213; 4 Bl. Com. 380.

(b) 33 & 34 Vict. c. 23.

(y) Wms. Real Prop. p. 151,

(c) Sect. 1.

since the 4th July, 1870, it does not incapacitate a person from making a valid will *unless such person be an outlaw*. A person is liable to be adjudged an outlaw when he fails to appear to answer to an indictment, and keeps out of the way so that he cannot be found and apprehended. The effect of a person being adjudged an outlaw is that he is *put out of the protection of the law*, and so is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise, and his property is forfeited to the Crown (e).

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SECTION III.—*The Will expressed in the Form required by Law must be the genuine Will of the Testator.*

When a will is expressed in the form required by law, the presumption, in the absence of suspicious circumstances, is, that the document expresses the testator's genuine will. For the fact of the testator having signed the will is, in the absence of such circumstances, sufficient proof that he knew and approved of the contents (f).

But this presumption may be rebutted by clear evidence that the will fails to express the genuine intention of the testator in consequence of:—

1. Mistake on the part of the testator;
2. Fraud practised upon the testator; or
3. Undue influence exercised over the testator.

1. *Mistake*.—A testator may, by mistake,—

- (1) Execute as his will an instrument which he never intended to be his will; or
- (2) Execute as his will an instrument which—

(e) 4 Steph. Com. p. 395, 10th ed.

(f) *Guardhouse v. Blackburn*,  
L. R. 1 P. & D. 109, 116.

- (a) Contains certain provisions which he never intended should be contained in it; or
- (b) Fails to contain certain provisions which he intended should be contained it.

These seem to be the only cases where mistake may invalidate a duly executed will. Mistakes of expression, such as misdescriptions of property or of legatees, do not invalidate the instrument in which they are contained, for they do not prevent it from being an expression of a genuine will; they merely create a difficulty in ascertaining what the genuine will really was; *e. g.*, where a legacy is given to "my namesake *Thomas*, the *second* son of my brother," and the testator's brother has no son named *Thomas*, but his second son is *William*, the description "second son" shows the testator's intention notwithstanding the mistake of the name, and *William* will be entitled to the legacy (*g*).

(1) Where a testator inadvertently executes as his will an instrument which he never intended to execute as his will, it is obvious that there is no expression of a genuine will, and the instrument is void: *e. g.*, Two sisters, *A.* and *B.*, were living together, and agreed to make their wills, chiefly for the purpose of giving a life interest to the survivor in the property of the one who died first; the provisions of the wills were almost identical, and were drawn up by *A.* *A.* died first, and it was then discovered that by mistake *A.* had signed *B.*'s will, and *B.* had signed *A.*'s. Sir *J. Hannen* refused to grant probate of *A.*'s will; *A.* "did not in fact know and approve of any part of the contents of the paper *as her will*, for it is quite clear that if she had known of the contents she would not have signed it" (*h*).

But in such cases there must be "proof establishing beyond

(*g*) *Stockdale v. Bushby*, cited 2 Wms. Exors. p. 1156, 8th ed.

(*h*) *In the goods of Hunt*, L. R. 3 P. & D. 250.

all possibility of mistake" that the testator did not intend the document to operate as his will (*i*).

(2)—(a) Where a testator inadvertently executes as his will an instrument which contains certain words or provisions which he never intended should be contained in it, there is no expression of a genuine will as regards such words or provisions, and accordingly, to that extent, the will is invalid: *e. g.*, A. gave instructions that a will should be drawn up bequeathing all his personal property to his wife. The will was drawn up by filling in a printed form of will, and by inadvertence a clause in the printed form, making a provision for children, was not struck out. A. duly executed the will, without observing or being aware of this clause. It was held that the will constituted a valid bequest of all the property to the wife, and the provision in favour of the children was inoperative (*k*).

Of course there must be clear evidence that the testator did not intend such words or provisions to operate as part of his will (*l*).

It seems possible that cases might arise where the rejection of certain words or provisions would so alter the meaning of the remainder of the will that it would fail to express the genuine intention of the testator. And it seems probable that in such cases the whole will would be held to be invalid. The subject was touched upon in a recent case as follows:—

"A more difficult question arises where the rejection of words alters the sense of those which remain. For even though the Court is convinced that the words were improperly introduced, so that if the instrument was *inter vivos* it would reform the instrument and order one in different words to be

(*i*) *Guardhouse v. Blackburn*, *Morrell*, 7 P. Div. 68.  
L. R. 1 P. & D. 109, 116.

(*l*) *Guardhouse v. Blackburn*,

(*k*) *In the goods of Duane*, 2 Sw. *supra*.  
& T. 590. See also *Morrell v.*

executed, it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will after its sense is thus altered as valid within the 9th section of the 7 Will. IV. & 1 Vict. c. 26, the signature at the end of the will required by that enactment having been attached to what bore quite a different meaning. It has never, so far as their lordships are aware, been necessary to decide as to this, though the judgment of Sir James Hannen in *Harter v. Harter* (m) has some bearing on it. And their lordships think it unnecessary, and therefore improper, now to express any opinion on this question, for the evidence does not raise it" (n).

(b) Where a testator executes as his will an instrument which fails to contain certain words or provisions which he intended should be contained in it, there is no expression of a genuine will so far as the instrument is affected by the omitted provisions. It is perfectly obvious that, since the Wills Act (o), the Court cannot give effect to the genuine will by ordering the omitted words or provisions to be added to, and read as part of, the document which the testator has executed; for this would be giving effect to a will which had not been expressed in the form required by law (p); but it seems that so far as the meaning of the will has been altered by the omission the will is invalid (q). Of course in this, as in other cases of mistake, the party impeaching the will must prove his case by the clearest evidence.

2. *Fraud*.—Where a will is made in consequence of impressions created in the mind of the testator by fraudulent

(m) L. R. 3 P. & D. 11.

(n) *Rhodes v. Rhodes*, 7 App. Cas. 192, 198, per Lord Blackburn.

(o) 7 Will. IV. & 1 Vict. c. 26, s. 9.

(p) See *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 114.

(q) See 1 Jarm. Wills, 412, 4th ed., citing *Earl of Newburgh v. Countess of Newburgh*, 5 Mad. 364.

misrepresentations, there can be no expression of a genuine will (*r*).

For instance, suppose A. is about to make a will in favour of B.; X., knowing of such intention, makes representations to A. respecting the character or conduct of B., which he (X.) knows or believes to be false, for the purpose of inducing A. to alter his mind; A. believes these false representations, and is induced by them to leave all his property to X., instead of to B. (*s*): it is clear that such a will is not the genuine will of A.; his will was to benefit B., and this he would have done had it not been for the false impressions created in his mind by the fraud of X.

Where the whole will is made in consequence of fraud practised upon the testator, the will is completely void; but where only some part of the will is the result of fraud, such part only is void and the remainder valid (*t*).

Of course fraudulent misrepresentations have no effect upon a will unless they actually deceive the testator at the time of making the will, and also lead him to make it (*u*), or, in other words, unless the particular will is the consequence of the fraud; for example, in the case above given, if A. had altered his mind respecting the gift to B. from some other cause than the false representations of X., the will would have been valid, notwithstanding that A. at the time believed such representations to be true, for in this case they would not have affected his will at all.

3. *Undue influence*.—The distinction between influence which is legitimate and that which is undue has been explained in a modern case (*x*) as follows:—"All influences are

(*r*) *Boyse v. Rossborough*, 6 H. L. Cas. at p. 44.

(*s*) Cf. *ibid.* p. 53.

(*t*) *Allen v. M'Pherson*, 1 H. L. Cas. at p. 209.

(*u*) Cf. *Longford v. Purdon*, 1 Ir. Ch. D. 75.

(*x*) *Hall v. Hall*, L. R. 1 P. & D. 481, 482.

not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like—these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever kind, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral commands asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven, and his will must be the offspring of his own volition and not the record of some one else's." The distinguishing mark, then, of undue influence is *coercion* (*y*). Whenever influence has the effect of coercing a testator it is undue. It may take the form of actual physical restraint or violence exercised upon the person of the testator or those closely connected with him, or of threats of such violence or restraint—in this form it is sometimes called duress; or it may take the form of persuasion used to a testator on his death-bed, when even a word distracts him, so that in fact the persuasion amounts to force (*z*). We cannot, therefore, predicate "undue" of any particular kind of influence in the abstract, but must, in each case where undue influence is alleged, ascertain, from the facts of the case, whether the instrument in question expressed the genuine will of the testator, or merely a will created in his mind by coercion (*a*).

(*y*) *Parfitt v. Lawless*, L. R. 2 P. & D. 462, 470.

(*a*) *Boyse v. Rossborough*, 6 H. L. Cas. at p. 45.

(*z*) Swin. Pt. 7, s. 4, pl. 1.

It may be here observed that there is a most important difference between wills and transactions *inter vivos* as regards proof of undue influence. "In equity persons standing in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence" (b). In such cases the presumption is that undue influence was exercised, and the transaction is invalid unless evidence be brought which rebuts the presumption (c). But this "has never been, and is not the law" regarding wills (c). The existence of parental and confidential relations, &c., between the testator and legatee, or devisee, will arouse the suspicion of the Court, and be ground for the strictest investigation of all facts and circumstances connected with the making of the will; but it raises no presumption of undue influence, and accordingly the will must be held to be valid unless evidence be brought before the Court proving that undue influence was exercised over the testator. Thus, in *Parfitt v. Lawless* (d), a testatrix gave the residue of her estate to a Roman Catholic priest, who had for many years resided as chaplain with the testatrix and her husband, and for part of that time, and at the time the will was made, had acted as her confessor. There was no evi-

(b) *Parfitt v. Lawless*, L. R. 2 P. & D. 462, 468.

(c) Pollock, *Contracts*, pp. 557 et seq., 4th ed.

(d) L. R. 2 P. & D. 462.



dence that the priest had interfered in the making of the will, or had procured the gift of the residue to himself, or had brought about such gift by coercion or dominion exercised over the testatrix against her will, or by importunity not to be resisted. It was not even shown that in the common affairs of life the testatrix was under the priest's control or dominion. Under these circumstances it was held that there was no evidence of undue influence to go to the jury, and that the will must be declared valid.

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SECTION IV.—*The Provisions of the Will must not be contrary to Law.*

So far as the provisions of a will are contrary to law, the will is of course void.

It would be out of place here to attempt an enumeration of the possible ways in which a will might be rendered invalid on this ground; but provisions in wills have so often been invalid through being (1) contrary to the law restricting the creation of future estates and interests in real and personal property, or (2) contrary to the law restricting dispositions of property for what are called "charitable" purposes and superstitious uses, that it seems necessary to refer briefly to the law on these subjects.

I. Restrictions upon the creation of future estates or interests in real or personal property.

The law on this subject relates to:—

1. The creation of contingent remainders;
2. The creation of executory interests (e);
3. The accumulation of the income of property in favour of future owners.

(e) As to the distinction between contingent remainders and executory interests, see Wms. Real Prop. p. 354, 16th ed.

1. *Contingent Remainders*.—The rule is that :—

“An estate cannot be given to an unborn person for life, followed by any estate to any child of such unborn person ” (g).

Accordingly a provision in a will giving an estate to the child of such unborn person is absolutely void. Thus, in a devise of real property to A. (an unmarried person) for life, remainder to A.’s eldest son for life, remainder to the sons of A.’s eldest son successively according to seniority in tail, the limitation of the estate tail to the sons of the eldest son is absolutely void (h).

2. *Executory Interests*.—The rule is that :—

An executory interest must commence within the period of a definite life or definite lives in being, and twenty-one years after the determination of such life or lives ; and every executory interest which *might*, in any event, transgress this limit is absolutely void (i).

Thus, a gift to the first son of A., a living person, who shall attain the age of twenty-one, is valid, for A.’s son must attain twenty-one either in A.’s lifetime or at any rate within twenty-one years of his death—allowing for the period of gestation, which is always done in these cases where the child is born after its parent’s death. But a gift to the first son of A., a living person, who shall attain the age of twenty-four, would be absolutely void, for if A. died leaving a son who was not three years old, the son’s interest would commence at a time exceeding twenty-one years from A.’s death.

To the general rule there is, however, one exception ; “if the executory limitation should be in defeasance of, or immediately preceded by an estate tail, then, as the estate tail and

(g) Wms. Real Prop. p. 314,  
16th ed.

(i) Wms. Real Prop. p. 359,  
16th ed. ; Personal Prop. p. 350,

(h) As to the *cy près* doctrine  
in such cases, see *post*, p. 238.

13th ed.

all subsequent estates may be barred by the tenant in tail, the remoteness of the event on which the executory limitation is to arise will not affect its validity" (k).

This exception can, of course, only apply to gifts of real estate: the general rule applies to both real and personal estate.

3. *Accumulation of the Income of Property*.—Before 1800 there was no restriction imposed by law upon provisions in deeds or wills for the accumulation of income in favour of future owners, unless, at least, such provisions were contrary to the rule just mentioned for limiting the creation of executory interests. But in 1799 it was found necessary to alter the law on this subject in consequence of Mr. Peter Thellusson's extraordinary will being held valid by the Courts. Thellusson devised real estate (of which the annual income was nearly 5,000*l.*), and also other estates directed to be purchased with the residue of his personal estate amounting to about 600,000*l.*, to trustees, in trust to accumulate the income during the lives of his sons A., B., and C., and of his grandson D., and during the lives of such issue of A., B., C., and D., *as might be living at the time of his (Thellusson's) death*. The accumulations were to be invested by the trustees in real estate, and after the death of A., B., C., and D., and of such of their issue as were living at Thellusson's death, the property was given to certain of their lineal descendants in tail (l). It will be observed that by limiting the accumulation to the lives of persons living at his death, Thellusson kept within the limits of the rule as to the creation of executory interests, and the Court was obliged to hold the will valid.

In consequence of this decision an Act was passed in 1800 (m) (sometimes called the "Thellusson Act"), which

(k) Wms. Real Prop. p. 360,  
16th ed.; *Heasman v. Pearse*, L. R.  
7 Ch. 275.

(l) *Thellusson v. Woodford*, 4  
Ves. 227.

(m) 39 & 40 Geo. III. c. 98.

provides that no income of real or personal property shall be accumulated for any longer period than—

(1) The life of the grantor or settlor; or

(2) Twenty-one years from the death of the grantor, settlor, or *testator*; or

(3) During the minority of any person living, or *in ventre sa mère* at the death of the grantor, settlor, or *testator*; or

(4) During the minority only of any person who, under the settlement or *will*, would for the time being, if of full age, be entitled to the income so directed to be accumulated.

“*Or*” is to be read in its ordinary disjunctive sense, and accordingly an accumulation can only take place during *one* of the specified periods. For instance, a direction in a will to accumulate the interest of trust funds for twenty-one years after the testator’s death, and, *at the expiration* of that time, during the minorities of the persons who will ultimately be entitled under the trusts, will only be valid for the period of twenty-one years after the testator’s death (*n*).

The Act expressly provides that the restrictions imposed by it shall not apply to any provision—(1) for payment of debts; or (2) for raising portions for children; or (3) respecting the produce of timber or wood (*o*).

A provision for accumulation of income during a period in excess of the time limited by the Act, is (1) valid *to the extent of the time allowed by the Act*, but (2) void *so far as the period is in excess of the time allowed by the Act* (*p*).

It must be observed that any provision for accumulation which exceeds the time allowed by law for the creation of executory interests, is absolutely void independently of the *Thellusson Act* (*q*).

(*n*) *Wilson v. Wilson*, 1 Sim. N. S. 288.      *Re Lady Rosslyn’s Trust*, 16 Sim. 391.

(*o*) Sect. 3.

(*q*) *Lord Southampton v. Marquis of Hertford*, 2 Ves. & Bea. 54.

(*p*) 1 Jarm. Wills, 306, 4th ed.;

II. Restrictions upon dispositions of property for charitable purposes, and superstitious uses.

1. *Charitable Purposes*.—The meaning of the word “charitable” was explained by Sir W. Grant, M. R., in *Morice v. Bishop of Durham* (*r*), as follows:—“That word in its widest sense denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this Court. Here its signification is derived chiefly from the Statute of Elizabeth (*s*). Those purposes are considered charitable which that statute enumerates, or which by analogies are deemed within its spirit and intendment.” In the preamble of the statute thus referred to, the following objects were specified as charitable:—

Relief of aged, impotent, and poor people, maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, scholars in universities, repair of bridges, ports, havens, causeways, churches, sea-banks and highways, education and preferment of orphans, relief, stock or maintenance for houses of correction, marriages of poor maids, supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed, relief or redemption of prisoners or captives, for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.

As instances of purposes analogous to these, and therefore held to be charitable purposes within the “spirit and intendment”—or as it is also called “the equity”—of the statute, may be mentioned, gifts for the erection of water-works for the use of the inhabitants of a town (*t*), for “charities and other public purposes” in a parish (*u*), and for founding prizes for essays (*v*).

(*r*) 9 Ves. at p. 405.

(*s*) 43 Eliz. c. 4.

(*t*) *Jones v. Williams*, Amb. 651.

(*u*) *Dolan v. Macdermot*, L. R.

5 Eq. 60.

(*v*) *Farrer v. St. Catherine's*

The Mortmain and Charitable Uses Act, 1888 (*r*), which came into operation on the 13th August, 1888, repeals the Statute of Elizabeth, but does not affect any right, obligation, or liability acquired, accrued, or incurred under it (*s*), and makes the following provision as to the preamble—"Whereas in divers enactments and documents reference is made to charities within the meaning, purview, and interpretation of the said Act [*i. e.*, the Statute of Elizabeth]: be it therefore enacted, that references to such charities shall be construed as references to charities within the meaning, purview, and interpretation of the said preamble (*t*). Accordingly, subject to these exceptions, the Statute of Elizabeth will not in future affect the construction of gifts for charitable purposes.

The policy of early times strongly favoured gifts, even of land, to charitable purposes. At the commencement of the 18th century, however, the tide of public opinion appears to have flowed in an opposite direction, and the legislature deemed it necessary to impose further restrictions on such gifts; from the nature of which it may be presumed that the practice of disposing by will of land to charity had antecedently prevailed to such an extent as to threaten public inconvenience. It appears to have been considered that this tendency would be sufficiently counteracted by preventing persons from alienating more of their lands for these objects than they chose to part with in their own lifetime; the supposition evidently being, that men were in little danger of being perniciously generous at the sacrifice of their own personal enjoyment, and when uninfluenced by the near approach of death (*u*). This change of opinion resulted in the passing of the statute 9 Geo. II. c. 36,

*Coll., Camb.*, L. R. 10 Eq. 19;  
numerous other similar cases are  
quoted, 1 Jarm. Wills, p. 209,  
4th ed.

(*s*) Sect. 13 (1).

(*t*) *Ibid.* (2).

(*u*) 1 Jarm. Wills, pp. 218, 219,  
4th ed.

(*r*) 51 & 52 Vict. c. 42.

commonly called the "Mortmain Act." It provided that, (1) "*no lands or hereditaments, nor (2) any money, stock, or other personal estate, to be laid out in the purchase of any lands or hereditaments, shall be conveyed or settled for any charitable uses, unless such lands or hereditaments, or money or personal estate (other than stock in the public funds) be conveyed by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of the donor or grantor, including the days of the execution and death, and enrolled in the High Court of Chancery within six calendar months next after the execution thereof, and unless such stock be transferred six calendar months at least before the death of the donor or grantor, including the days of the transfer and death*" (x). And "all gifts, conveyances, and settlements for any charitable use whatsoever, made *in any other manner or form*" than by the Act directed, are declared to be "absolutely and to all intents and purposes null and void" (y).

This statute was repealed by the Mortmain and Charitable Uses Act, 1888 (z), which came into operation on the 13th August, 1888, but the provisions above mentioned were practically re-enacted, with some few alterations which are immaterial for our present purpose. Consequently all such gifts, if made by will, whether before or after the 13th August, 1888, are null and void (for a will could not be made so as to satisfy the requirements of the statutes) *unless they fall within some of the exceptions* which will be mentioned later on (a).

The Mortmain Act of 9 Geo. II. speaks of "lands or hereditaments"; the Mortmain and Charitable Uses Act, 1888, speaks of "land" (b), but defines land as including "tene-

(x) Sect. 1; Wms. Real Prop.  
p. 88, 16th ed.

(y) Sect. 4.

(z) 51 & 52 Vict. c. 42, s. 13.

(a) *Post*, p. 192.

(b) Sect. 4 (1).

ments and hereditaments, corporeal or incorporeal, of whatsoever tenure, and any estate and interest in land" (z). Without speculating as to the construction which may be placed upon this new Act, it may be useful to explain very briefly how the old Act was interpreted by the Courts.

The Mortmain Act of 9 Geo. II. was very strictly construed, and bequests for charitable purposes of personal estate which in any degree "savoured of the realty," as it was called, were held to be void (a). Thus it was held that bequests of leasehold property (b), money secured by mortgage (c), and shares in a canal navigation (d), for charitable purposes, were void; for in such cases the bequest gave an interest, though indirectly, in land, and thus savoured of the realty. Bequests of shares in companies whose funds were invested in land or the objects of which necessitated the holding of land have been the most fruitful source of litigation on the point; but the "current of modern decisions is against the older cases," and "while there is to be found an inclination formerly to carry the provisions of the Act beyond the intention of the legislature, the tendency of modern decisions has been the other way" (e).

Thus, bequests for charitable purposes of money secured by policies of assurance, although the assurance company invested its funds in real estate (f), of shares in a banking company authorized to invest money on mortgage of real estate (g), of shares in a mining company (h), and of shares in a land

(z) Sect. 10 (iii).

(a) Wms. Personal Prop. p. 543, 12th ed.

(b) *Att.-Gen. v. Graves*, Amb. 155.

(c) *Att.-Gen. v. Meyrick*, 2 Ves. sen. 44.

(d) *Howse v. Chapman*, 4 Ves. 542.

(e) Per Lord St. Leonards, *Myers v. Perigal*, 2 De G. M. & G. 619.

(f) *March v. Att.-Gen.*, 5 Beav. 433.

(g) *Myers v. Perigal*, 2 De G. M. & G. 599.

(h) *Hayter v. Tucker*, 4 Kay & J. 243.



company (i), have been held valid. The test in such cases seems to have been, "not whether the holder of the shares can in some sense be said to be interested in land, but whether the share is such a share as, under any ordinary state of circumstances, *can result to him in the shape of land*. In other words, is the right of the shareholder merely a right to call for his share of the *profits*, and not for a *specific share of the land itself*" (k) ?

A distinction has been drawn between bequests of shares in a company and bequests of debentures whereby the undertaking of a company with the rents and tolls have been mortgaged, and the latter kind of bequests have been held to be invalid (l). But it has been decided in more recent cases that debentures made by a railway company do not give the debenture holder a specific charge upon the property, but only upon the net profits and earnings of the company, and accordingly a bequest of such debentures to a charity is valid (m). The principle of these decisions is applicable to the debentures of all other public bodies with parliamentary powers and duties to be exercised for the public benefit, as harbour, dock, canal, and waterworks companies, and public bodies constituted for the improvement of towns (n) ; and therefore it appears to have been settled law that bequests of such debentures to charities were valid.

Bequests of money to charities for the express purpose of being laid out in the purchase of land are, of course, void ; and, even where there was no express direction that land should be purchased, a bequest was, as a general rule, void if the charitable object for which the money was given was of

(i) *Entwistle v. Davis*, L. R. 4 Eq. 274.

(k) *Ibid.*

(l) *Ashton v. Lord Langdale*, 4 De G. & Sm. 402 ; *In re Lang-*

*ham's Trusts*, 10 Hare, 446 ; *Thornton v. Kempson*, Kay, 592.

(m) *Attree v. Hawe*, 9 Ch. D. 351 ; and cases there cited.

(n) 1 Jarm. Wills, 225, 4th ed.

such a kind as to involve the acquisition of land. Thus, a bequest of money to be laid out in building a hospital (*o*) or school (*p*) was void, for land must be acquired before a building can be erected; so a bequest of money to enable trustees to complete a contract they had already entered into for the purchase of land for a charity, or to pay off an encumbrance on real estate which already belonged to a charity, was void (*q*). But bequests of money for the erection, repair, or improvement of buildings upon land which *was already in mortmain*, were valid (*r*), provided, at least, the terms of the will precluded the application of the legacy to the acquisition of fresh land for the purpose of the building or improvements, for, otherwise, the mere fact that the charity possessed land, on which the building *might* be erected, did not render the bequest valid (*s*). It was also decided that a bequest of money to be employed in building was valid where the building was made conditional upon land being given for the purpose at some limited future time, and no part of the legacy was to be applied to the purchase of land (*t*).

The following charitable objects have been excepted from the operation of the Mortmain Acts, either by those Acts themselves or by other statutes, and therefore devises of land, or bequests of personal estate to be invested in land, for these objects are valid:—

1. Exceptions created by the Mortmain Act of 9 Geo. II. (*u*).

Gifts for the benefit of the University of Oxford or Cambridge, or any college or house of learning within either University, or the colleges of Eton, Winchester, or West-

(*o*) *Pelham v. Anderson*, 2 Eden, 180.  
296.

(*p*) *Att.-Gen. v. Nash*, 3 Bro. C. C. 588.

(*q*) *Corbyn v. French*, 4 Ves. 431; *Tudor's L. C.* 519, 3rd ed.

(*r*) *Att.-Gen. v. Parsons*, 8 Ves.

(*s*) *Giblett v. Hobson*, 5 Sim. 651.

(*t*) *Att.-Gen. v. Philpott*, 6 H. L. Cas. 338; overruling *Trye v. Corporation of Gloucester*, 14 Beav. 173.

(*u*) Sect. 4.

minster. But the gift must have been made for some academical or collegiate purpose (*v*).

2. Exceptions created by the Mortmain and Charitable Uses Act, 1888.

(1) All the exceptions created by the Mortmain Act of 9 Geo. II. (*w*).

(2) Gifts for the benefit of the Universities of London and Durham, and the Victoria University, or any of the colleges or houses of learning within any of those Universities, or Keble College, Oxford (*w*).

(3) A devise of land for a public park, for a public museum, or for a school house for an elementary school; provided the quantity of land does not exceed *twenty* acres for any one park, *two* acres for any one museum, or *one* acre for any one school house (*x*).

(4) A bequest of personal estate to be applied in or towards the purchase of land for any of the purposes mentioned in (3) (*x*).

But N.B. the will in (3) and (4) must be executed not less than twelve months before the death of the testator, or must be a reproduction in substance of a devise in a previous will in force at the time of such reproduction and executed *twelve* months before the death of the testator; and such will must be enrolled in the books of the Charity Commissioners within *six* months after the death of the testator (*y*).

3. Exceptions created by other statutes.

The Mortmain and Charitable Uses Act, 1888, expressly provides that any statute now in force which either wholly or partially excluded the operation of the Mortmain Act, 9 Geo. II. shall to the same extent exclude the operation of the new Act (*z*). The chief exceptions created by such

(*v*) *Whorwood v. University Coll., Oxford*, 1 Ves. 53.

(*w*) Sect. 7 (i). This college did not come under the exceptions contained in the former Mortmain

Act.

(*x*) Sect. 6 (1), (3).

(*y*) Sect. 6 (2).

(*z*) Sect. 8.

Acts are gifts to (1) the Foundling Hospital (*a*), (2) the British Museum (*b*), (3) the Marine Society (*c*), (4) the Bath Infirmary (*d*), (5) Queen Anne's Bounty (*e*), (6) The Royal Navy Asylum (*f*), (7) Commissioners of Greenwich Hospital (*g*), (8) St. George's Hospital (*h*), (9) The Seamen's Hospital Society (*i*), (10) Museums of Art and Science (*j*). There are also some other exceptions (*k*).

## 2. *Superstitious Uses.*

A superstitious use has been defined as "one which has for its object the propagation of the rites of a religion not tolerated by the law" (*l*). Accordingly, all gifts of property for the propagation of the religions of Roman Catholics, Protestant Dissenters, and Jews, were formerly regarded as gifts for superstitious uses; and such gifts were invalid, for although only certain of them, when made for the support of the rites and ceremonies of the Church of Rome, were expressly declared void by statute (*m*), yet all the rest were held to be invalid as being contrary to the policy of the law (*n*).

However, by the Toleration Act (*o*), passed in 1688, Protestant Dissenters, except Unitarians, and by a later Act (*p*) Unitarians, were relieved from the operation of the various penal and disabling statutes whereby the legislature had attempted to suppress their tenets, and consequently

(*a*) 17 Geo. II. c. 29.

(*b*) 26 Geo. II. c. 22, s. 14, and  
5 Geo. IV. c. 39.

(*c*) 12 Geo. III. c. 67.

(*d*) 19 Geo. III. c. 23.

(*e*) 43 Geo. III. c. 107.

(*f*) 51 Geo. III. c. 105.

(*g*) 10 Geo. IV. c. 25, s. 37.

(*h*) 4 Will. IV. c. 38 (local and  
personal Acts).

(*i*) 3 & 4 Will. IV. c. 9, ss. 1, 2.

(*j*) 13 & 14 Vict. c. 65, repealing  
8 & 9 Vict. c. 43.

(*k*) See Chron. Index to the  
statutes, p. 659, 4th ed.

(*l*) Boyle, 242, quoted Tudor's  
L. Cas. 541, 3rd ed.

(*m*) 23 Hen. VIII. c. 10; 1  
Edw. VI. c. 14.

(*n*) *Rex v. Portington*, 1 Salk.  
162; *De Costa v. De Pas*, 1 Amb.  
228; *Att.-Gen. v. Baxter*, 1 Vern.  
248.

(*o*) 1 Will. & Mary, c. 18.

(*p*) 53 Geo. III. c. 160.

gifts for the propagation of their religion ceased to be for superstitious uses, and became valid.

In 1832 an Act (*q*) was also passed in favour of Roman Catholics; it provides that they, "in respect of their schools, places for religious worship, education, and charitable purposes in Great Britain, and the property held therewith, and the persons employed in or about the same, shall, in respect thereof, be subject to the same laws as the Protestant Dissenters are subject to in England in respect to their schools, places for religious worship, education, and charitable purposes, and not further or otherwise." It seems that gifts for other than these specified objects, when made in favour of the Roman Catholic religion, will still be invalid, at least in England. Thus, a bequest to procure masses for the dead has been held to be a gift for a superstitious use, and accordingly invalid (*r*).

By a still later statute (*s*) passed in 1846, the Jews, "in respect of their schools, places of religious worship, education, and charitable purposes, and the property held therewith," were made subject to the same laws as Protestant Dissenters are subject to, "and not further or otherwise" (*t*).

Where a disposition of property by will is for a charitable as well as a superstitious use, the Crown will be entitled to the property, and will devote it to a charitable object which is not superstitious (*u*); but where it is for a superstitious use alone, the representatives of the testator will be entitled to it (*v*). Thus, a bequest of the residue of the testator's estate for the purpose of educating and bringing up poor orphan children in the Roman Catholic religion was held void (before 2 & 3 Will. IV. c. 115 was passed), as being a superstitious

(*q*) 2 & 3 Will. IV. c. 115.

(*t*) Sect. 2.

(*r*) *West v. Shuttleworth*, 2 My. & Keen, 684.

(*u*) *De Costa v. De Pas*, Amb. 228.

(*s*) 9 & 10 Vict. c. 59.

(*v*) *West v. Shuttleworth*, *supra*.

use so far as regarded the direction that the children were to be educated in the Roman Catholic religion, but, being for the benefit of *poor orphan children*, it was also a charitable use (*x*), and accordingly it was also held that the property should be disposed of for such purposes as the King should direct (*y*). But when a bequest of residue was made to Roman Catholic priests and chapels in order that the testatrix might have the benefit of prayers and masses, it was held that the next of kin were entitled to the property (*z*), for in this case there was no charitable as well as superstitious use.

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SECTION V.—*The persons to whom interests are given under a will must be capable of acquiring such interests by will.*

Every person, whether natural or artificial (*i. e.*, a corporation), is capable of acquiring an interest under a will, unless specially incapacitated by law.

We must therefore inquire to what extent (1) natural, and (2) artificial persons, *i. e.*, corporations, are incapacitated by law.

I. *Natural Persons.*

1. A witness, or the wife or husband of a witness, to the will.

It is expressly provided by the Wills Act (*a*), that the gift of any *beneficial interest* to a witness, or to the wife or husband of a witness, to the will (except charges or directions for the payment of any debt or debts due from the testator to such witness, &c.) shall be *utterly null and void*.

(*x*) See *supra*, p. 187.

& Keen, 684.

(*y*) *Cary v. Abbot*, 7 Ves. 490.

(*a*) 7 Will. IV. & 1 Vict. c. 26,

(*z*) *West v. Shuttleworth*, 2 My. s. 15.

## 2. Aliens.

(1) Alien friends, *i. e.*, the subjects of a foreign state which is at peace with England.

Gifts of personal chattels to alien friends seem always to have been valid (*b*). But as an alien was incapable of acquiring real estate or chattels real (except a term not exceeding twenty-one years for the residence or occupation of himself or his servants, or for the purpose of any trade, business, or manufacture) (*c*), he could not acquire real estate or chattels real by will, and any such gift was forfeited to the Crown. This incapacity has, however, been taken away by the *Naturalization Act*, 1870 (*d*), which provides that real and personal estate of every description may be taken, acquired, held, and disposed of by an alien in the same manner as by a natural-born British subject.

(2) Alien enemies, *i. e.*, subjects of a foreign state which is at war with England.

The general rule seems to be that real or personal property devised or bequeathed to alien enemies is forfeited to the Crown (*e*). But when war is declared in modern times it is usual, in the proclamation of war, for the Crown to permit the subjects of the enemy resident in this country to continue here so long as they peaceably demean themselves, and such persons would be deemed alien friends in effect; and an alien enemy would be in the same position who might come here after the war commenced, if resident here by licence from the Crown (*f*).

II. *Artificial Persons.*

Corporations are capable of acquiring personal property,

(*b*) *Calvin's Case*, 7 Co. 17.

(*c*) Wms. Real Prop. p. 83,  
16th ed.

(*d*) 33 Vict. c. 14, s. 2.

(*e*) *Att.-Gen. v. Weedon*, Parker,  
267. This was the case of a legacy

of personal property, but the principle of the decision seems applicable to all gifts by will.

(*f*) See Wms. Exors. vol. i.  
p. 234, vol. ii. p. 1056, 8th ed.

but are, as a general rule, incapable of acquiring real property by will.

The incapacity of corporations to hold real estate seems originally to have been created for the benefit of the feudal lords, who would have been deprived of their escheats and other feudal profits had the tenant been permitted to aliene his land to corporations—for corporations do not die.

The earliest statute on the subject was the re-issue of *Magna Carta* in 1217 by Henry III., which prohibited the alienation of land to religious houses; but in the reign of Edward I. the prohibition was extended to alienations to any corporation, whether ecclesiastical or lay, sole or aggregate (*g*); *i.e.*, to any alienation of lands “*per quod ad manum mortuam deveniant*.” The restriction on holding lands by corporations (*i.e.*, holding in mortmain) might have been dispensed with by obtaining a licence from the Crown and the mesne lords, if any; but if no such licence were obtained the effect of the alienation was that the corporation took the land but could not hold it, and it was forfeited to the Crown or mesne lord (*h*). The statute 32 Hen VIII. c. 1 (which, as we have seen (*i*), enabled persons to dispose by will of all land held by socage, and two-thirds of that held by military tenure) was silent on the subject of devises to corporations, but such devises were excepted by section 4 of 34 & 35 Hen. VIII. c. 5 (which was passed in order to explain 32 Hen. VIII. c. 1) and were accordingly void. A corporation could not, therefore, even *take* under such a devise. The Wills Act (*j*) repealed 34 & 35 Hen. VIII. c. 5, without reserving the prohibition against devises to corporations, and so the effect of such a devise would be the same as that of an

(*g*) 7 Edw. I., stat. 2, c. 13;      repealed by 51 & 52 Vict. c. 42,  
13 Edw. I. c. 32; 18 Edw. I. c. 3;      s. 13.

and see 15 Rich. II. c. 5. All      (*h*) 1 Jarm. Wills, 66, 4th ed.

these statutes will be found in      (*i*) *Supra*, p. 38.

Digby's Real Prop.; they were      (*j*) 7 Will. IV. & 1 Vict. c. 26.



alienation *inter vivos* to a corporation, *i.e.*, the corporation can *take* but cannot *hold* real estate devised to it, and accordingly such real estate is forfeited to the Crown or mesne lord, unless by licence from the Crown (*k*) or by Act of Parliament, the corporation is *authorized to hold real estate* (*l*).

The law relating to mortmain has been consolidated and amended by the Mortmain and Charitable Uses Act, 1888 (*m*), but without making any change in the law as above stated.

SECTION VI.—*The Will must remain unrevoked at the Death of the Testator.*

A testator may revoke his will, and afterwards change his mind and revive it, in which case it will be as valid as if it had never been revoked, and thus may remain unrevoked at his death. We must therefore inquire (A) how wills may be revoked, and (B) how revoked wills may be revived.

A. *The different Ways in which a Will may be revoked.*

A will may be revoked in the following different ways:—

1. By marriage of the testator.

The Wills Act (*n*) provides that “Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not, in default of such appointment pass to his or her heir, customary heir, executor or administrator, or the persons entitled as his or her next of kin under the Statute of Distributions” (*o*).

(*k*) A licence from the mesne lord is now unnecessary. 7 & 8 Will. III. c. 37.

(*l*) See Jarm. Wills, p. 66, 4th ed.

(*m*) 51 & 52 Vict. c. 42, Part I.

(*n*) 7 Will. IV. & 1 Vict. c. 26, s. 18.

(*o*) *Supra*, p. 108.

The reason for this exception is, that in cases where the heir or next of kin are *not* entitled in default of appointment, the revocation of the will could not be of any benefit to the issue of the marriage.

The law as to revocation by marriage, before the Wills Act came into operation, was as follows (*p*)—

If a woman made a will, and afterwards married, the marriage alone was a revocation of the will. And although the wife should survive the husband, yet the will would not survive after the husband's death without a re-publication. But marriage did not affect a will made by the woman before marriage in exercise of a power of appointment.

If a man made a will, and afterwards married, the marriage alone was *not* a revocation of the will, but the Courts adopted the rule that if he had issue, and died leaving his wife and issue unprovided for, this should be considered as an implied revocation of the will. The rule, however, is not found in ancient authorities, and was the result of modern decisions (*q*).

2. By the execution of a subsequent *valid* will, or codicil (*r*).

But unless the subsequent will, or codicil, *expressly revokes the will*, the will is only revoked so far as it is inconsistent with the subsequent will, or codicil (*s*).

3. By "some writing" declaring an intention to revoke the will, and executed in the same manner in which a will is required to be executed (*t*).

For instance, where a testator wrote a memorandum, at the

(*p*) See 1 Wms. Exors. pp. 195, 196, 8th ed.

(*q*) The first case on the point seems to be that of *Overbury v. Overbury* (2 Show. 242), decided in 1682.

(*r*) 7 Will. IV. & 1 Vict. c. 26, s. 20.

(*s*) *Lemage v. Goodban*, L. R. 1 P. & D. 57; *Re Howard*, *ibid.* 636.

(*t*) 7 Will. IV. & 1 Vict. c. 26, s. 20.

foot of his will, to this effect—"This will was cancelled this day;" and such memorandum was duly signed by the testator in the presence of two witnesses, it revoked the will although it did not itself constitute a will or codicil (*u*).

4. By "the burning, tearing, or otherwise destroying" the will, "by the testator, or by some person in his presence and by his direction, *with the intention* of revoking the same" (*v*).

Mere accidental destruction of the will does not revoke it, and the will must be carried out, provided, of course, it is possible to prove its terms from other sources (*x*).

5. Where *specific* property is devised or bequeathed by the will, and the testator in his lifetime sells or otherwise disposes of such property, the will is, of course, revoked with respect to such property.

With reference to this point it must be observed that, by the Wills Act (*y*), "no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid (*z*), shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death" (*a*). Under the old law, if a testator aliened land which he had disposed of by will, and subsequently re-acquired the same lands and held them at the time of his death, they would not have passed to the devisee (*b*). But now any intermediate dealing with the property, between the execution of the will and the

(*u*) *In the goods of Fraser*, L. R. 2 P. & D. 40.

(*v*) 7 Will. IV. & 1 Vict. c. 26, s. 20.

(*x*) See *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154.

(*y*) Sect. 23.

(*z*) *I. e.* 1, 2, 3, and 4, *supra*, pp. 199 *et seq.*

(*a*) *Moor v. Raisbeck*, 12 Sim. 139; *Ford v. De Pontes*, 30 Beav. 593.

(*b*) See *Jarm. Wills*, 147, 4th ed.

death, will not operate as a revocation, provided the testator had power to dispose of it by will at the latter date.

The Wills Act expressly provides that “no will shall be revoked by any presumption of intention on the ground of an alteration in circumstances” (c). Under the old law the Courts (at least the Ecclesiastical Courts) seem to have considered that a change in the condition of the testator, other than his marriage, might have been a ground for presuming an intention to revoke his will (d).

6. By change of the testator’s domicil. The general rule is, that the validity of a will of personal estate depends upon the law of the testator’s domicil at the time of his death. If, therefore, a testator domiciled in France should make a valid will according to French law, and afterwards should come over to England and die domiciled here, the validity of his will would depend upon whether it conformed to the requirements of English law, and if it did not the will would be void. The change of domicil would thus operate as a revocation of the will.

In case, however, of *British subjects* who die after the 6th August, 1861, it has been provided by a recent Act (e) that their wills “shall not be held to be revoked or to have become invalid” by reason of any subsequent change of domicil (f).

#### B. *The different Ways in which a revoked Will can be revived.*

A revoked will can only be revived in two ways (g);—

1. By the re-execution of the will in the manner required by the Wills Act for the execution of wills (h).

(c) 7 Will. IV. & 1 Vict. c. 26, s. 19.

(d) 1 Wms. Exors. p. 205, 8th ed.

(e) 24 & 25 Vict. c. 114.

(f) Sect. 3; *Re Reid*, L. R. 1 P. & M. 74.

(g) 7 Will. IV. & 1 Vict. c. 26, s. 22.

(h) *Supra*, p. 157.

2. By a codicil, executed in the manner required by the Wills Act for the execution of codicils (*i*), and showing an intention to revive the will.

Before the Wills Act (*k*) came into operation, a will of real estate could only be revived by re-execution of the will, in the manner provided by the Statute of Frauds for the execution of wills of land (*l*). But wills of personalty could be revived, not only by an attested codicil or other writing, but also by a mere parol declaration of intention, or by words or acts from which an intention could be implied (*m*).

(*i*) *Supra*, p. 159.

(*k*) 7 Will. IV. & 1 Vict. c. 26.

(*l*) *Supra*, p. 156. This was

expressly provided by the 5th section.

(*m*) 1 Wms. Exors. p. 209, 8th ed.

## CHAPTER II.

## THE SUCCESSION OF THE EXECUTOR.

THE succession of the executor will be dealt with under the following heads:—

- I. The appointment of the executor.
  - II. The persons who are capable of acting as executors.
  - III. Probate of the will.
  - IV. The rights and obligations of the executor.
- 

SECTION I.—*The appointment of the Executor.*

The appointment of the executor may be either express or constructive.

Express, where a person is expressly named as executor, *e.g.*, “I appoint John Smith to be the executor of this my will.”

Constructive, where no person is expressly named as executor, “yet, if by any word or circumlocution the testator recommend, or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors” (*a*), *e.g.*, a declaration in the will that John Smith shall have the testator’s goods after his death “to pay his debts, and otherwise to dispose at his pleasure”; so if the testator says, “I commit all my goods to the administration of John Smith,” or “to the disposition of John Smith,” in

(a) 1 Wms. Exors. p. 243, 8th ed.

all such cases John Smith is made executor. An executor so appointed is usually called "*executor according to the tenor*" (b).

The appointment of the executor is generally *absolute*: i.e., the appointment is unconditional and unlimited; for instance, "I appoint John Smith executor of this my will." But in some cases the appointment is qualified by limitations in point of time, place, or property, or by a condition being imposed (c).

*Limitations :*

(1) In point of time—

*e. g.*, A. and B. are appointed executors, but B. is not to intermeddle with the estate during the life of A. So X. may appoint A. to be his executor for a particular time only, as during the five years next after his decease.

(2) In point of place—

*e. g.*, X. may appoint A. executor for his goods in Cornwall, B. for those in Devon, and C. for those in Somerset. Where a testator has goods in different countries, it is very convenient to appoint an executor for the goods in each country.

(3) In respect of the property bequeathed—

*e. g.*, X. may appoint A. executor for his plate and household stuff, B. for his sheep and cattle, and C. for his leases, &c.

But although the testator may thus divide the authority of his executors, yet, as far as creditors are concerned, they are regarded as one executor, and may be sued as such.

*Conditions :*

*e. g.*, X. appoints A. his executor, provided he gives security for the payment of the legacies, &c., before he acts as executor; or provided he proves the will within three months after the testator's death.

(b) 1 Wms. Exors. p. 243, 8th ed.      from which the following illustrations are taken.  
(c) *Ibid.*, pp. 253 *et seq.*, 8th ed.,

SECTION II.—*The Persons who are capable of acting as Executors.*

The general rule is, that any person who has been appointed executor under a will is capable of acting as executor (*d*).

To this general rule there are the following exceptions—

1. An infant is, by 38 Geo. III. c. 87, incapable of exercising the office of executor during his minority.

2. Idiots and lunatics are incapable of being executors; for they are “not only incapable of executing the trust reposed in them, but also by their insanity and want of understanding they are incapable of determining whether they will take upon them the execution of the trust or not” (*e*).

3. “The office of executor being a private one of trust named by the testator, and not by the law, the person nominated may refuse (*f*), though he cannot assign the office; and even if in the lifetime of the testator he has agreed to accept the office, it is still in his power to recede” (*g*). Under the old law, when an executor had refused to act, or, as it is called, had renounced probate of the will, he could nevertheless, in many cases, subsequently withdraw his renunciation, and was then entitled to act as executor. But now, by an Act of the present reign (*h*), where any executor renounces probate of a will *all his rights in respect of the executorship shall wholly cease*.

4. Where the person appointed executor is a bankrupt or insolvent. If the testator *knew*, at the time of appointing him, that he was a bankrupt or insolvent, it seems that he cannot be prevented from acting as executor; but, in other cases, he will be restrained from administering the estate by

(*d*) 1 Wms. Exors. p. 232, 8th ed.

(*e*) *Ibid.*, p. 242, 8th ed.

(*f*) See *post*, p. 213.

(*g*) 1 Wms. Exors. p. 278, 8th ed.

(*h*) 20 & 21 Vict. c. 77, s. 79.



the Chancery Division, and a receiver will be appointed to administer the estate, and the executor will be compelled to allow his name to be used in all actions which it may be necessary to bring (*i*).

If there be no appointment, express or constructive, of an executor in the will, or if the persons appointed are all incapable of acting, or renounce probate, or die before they have taken out probate, the Probate Division will appoint a person to administer the estate in accordance with the provisions of the will. Such person is called an *administrator cum testamento annexo* (*k*).

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### SECTION III.—*Probate of the Will.*

All the rights of the executor, as representative of the testator, are derived from the will itself and vest in him from the moment of the testator's death (*l*). But the executor cannot (except in a few cases) enforce these rights by proceedings in the Courts of law until he has proved the will in the Probate Division, and thus obtained authentic evidence of the validity of the will whereby he has been appointed executor (*m*).

What has already been said respecting the former jurisdiction of the Ecclesiastical Courts to grant letters of administration to the estates of intestates, and the transfer of such jurisdiction to the Court of Probate, and subsequently to the Probate Division of the High Court of Justice (*n*), applies equally to the jurisdiction to grant probate of wills.

A will may, *in all cases*, be proved in the Principal Registry of the Probate Division (*o*) at Somerset House, London;

(*i*) 1 Wms. Exors. p. 240, 8th ed.

(*k*) See *post*, p. 228.

(*l*) See *post*, p. 212.

(*m*) See *post*, p. 213.

(*n*) *Supra*, p. 93.

(*o*) 20 & 21 Vict. c. 77, s. 59.

but in case the testator had a fixed place of abode, at the time of his death, within the district of a District Registry, the will may be proved in such District Registry (*p*), provided there be no contention respecting the grant of probate (*q*). In all cases of contention the Probate Division must, as a general rule, decide whether or no probate shall be granted, but this "contentious jurisdiction" of the Probate Division may be exercised by the County Court having jurisdiction in the district of the District Registry in which the testator had a fixed place of abode, provided the testator's personal estate (without deducting debts) does not exceed 200*l.*, and his real estate 300*l.*, in value (*r*).

A will may be proved in two ways, (1) in *common form*, or (2) in *solemn form* (or, as it is sometimes called, proving *per testes*). In either case the executor must pay the proper duty (*s*).

1. *Probate in Common Form*.—A will is said to be proved in common form when it is proved in the absence of, and without citing, the parties interested in the estate (*t*).

Where the will is perfect on the face of it, and there is an *attestation clause* reciting that the requirements of the Wills Act have been complied with (*u*), the only proof necessary is the oath of the executor, which is made in the following form (subject to such alterations as circumstances may require):—

I, C. D., of \_\_\_\_\_, make oath and say, that I believe the paper writing hereunto annexed, and marked by me, to contain the true and original last will and testament, with a codicil thereto of A. B., late of \_\_\_\_\_, deceased; and that I am the sole executor therein named, and that I will well and faithfully administer the personal estate and effects of the said testator by paying his just debts and the legacies contained in his will and codicil so far as the same shall thereto extend and the law bind me, and that I will exhibit a true and perfect

(*p*) 20 & 21 Vict. c. 77, s. 46. effect.

(*q*) *Ibid.*, and s. 48.

(*s*) See Appendix.

(*r*) 21 & 22 Vict. c. 95, s. 10.  
Sect. 11 of this Act repeals sect. 54  
of 20 & 21 Vict. c. 77, to the same

(*t*) 1 Wms. Exors. p. 330, 8th ed.

(*u*) *Supra*, p. 158.

inventory of all and singular the said estate and effects, and render a just and true account thereof whenever required by law so to do: That the testator died at           , on the           day of           , 18   , and that the whole of the personal estate and effects of the said testator does not amount in value to the sum of           pounds to the best of my knowledge and belief.

Where there is no attestation clause, or one which does not state that all the prescribed ceremonies have been performed, an affidavit is required from one of the witnesses to the will, by which it must appear that the will was executed in the manner required by the Wills Act. But this may be dispensed with if the witnesses, after diligent inquiry, are not forthcoming (*u*).

If any unattested obliteration, interlineation, or alteration, should appear on the face of the will, the practice is to require an affidavit, showing whether they were made before or after the execution of the will, and, if no such evidence can be adduced, probate will be granted of the will as it originally stood (*x*).

2. *Probate in Solemn Form*.—A will is said to be proved in solemn form when all persons who have an interest in the estate (as the husband, or widow, and next of kin, who would be entitled to the property in case of intestacy) have been cited to attend the proceedings. The witnesses to the will are called and examined on oath, and other witnesses may be called, or other evidence taken, respecting facts material to the validity of the will (*y*).

The difference in effect between probate in common and in solemn form is, “that the executor of the will proved in common form may, at any time *within thirty years*, be compelled, by a person having an interest, to prove it *per testes* in solemn form. . . . So that if the witnesses be dead

(*u*) 1 Wms. Exors. p. 335, 8th ed.

(*y*) *Ibid.* p. 337, 8th ed.

(*x*) *Ibid.*, and note (*a*).

in the meantime, it may endanger the whole testament. Whereas the testament being proved in solemn form of law, the executor is not to be compelled to prove the same any more; and although all the witnesses afterwards be dead, the testament still retains its full force" (z). Accordingly a will is proved in solemn form not only when the validity of the will is disputed, but also whenever there is a probability of any such dispute arising in the future.

After the will has been proved it is deposited in the registry and a copy of the will with a certificate, under the seal of the principal or district registry and signed by the registrar, certifying that the will has been proved either in common or solemn form, is handed to the executor. This is called the *probate* of the will.

It must be observed that where a person dies domiciled in a foreign country having disposed by will of *personal* property which is in England, and the will has been proved in the foreign country, the executor must nevertheless prove the will again in England in order that his right to the property may be recognised by the English Courts. But as a general rule the Probate Division will adopt the decision of the foreign tribunal before whom the will has been proved (a).

In the case of a testator dying domiciled in Scotland or Ireland, and leaving personal estate in England, a *confirmation* (*i. e.* the Scotch term for probate) granted in Scotland, or a probate granted in Ireland, shall, after being produced in, and sealed with the seal of, the Probate Division, have the same effect as a grant of probate or administration by the Probate Division (b).

On the other hand, where a testator dies domiciled in England leaving personal property in another country, and

(z) 1 Wms. Exors. p. 339, 8th ed.

(a) *Ibid.* p. 367.

(b) As to Scotland, 21 & 22 Vict. c. 56, s. 12; as to Ireland, 20 & 21 Vict. c. 79, s. 95.

his will is proved in England, the probate will not extend to the property abroad (at least so long as it remains abroad). The executor must, therefore, prove the will in the manner required by the law of the country where the property is situated (c).

In all these cases, where a testator is domiciled in one country and leaves personal property in another, the established rule is, that the validity of the will must be determined by the law of the testator's domicile at the time of his death. Thus, if a foreigner, domiciled abroad, die, having disposed by his will of personal property in England, the Probate Division, in deciding whether the will be valid or not, will be guided, not by our own law, but by the law of the country where the deceased was domiciled (d). So, if a British subject domiciled abroad disposed by his will of personal property in England, and the will were valid according to English law but invalid according to the law of the country where he was domiciled at the time of his death, the same principle formerly applied and the deceased died intestate (e). But, as we have seen, this principle does not apply, so far as regards the *form* of the will, to wills of British subjects dying after the 6th August, 1861, provided the will be made in the form required either by (1) the law of the place *where the will was made*; or (2) the law of the place where the testator was domiciled *at the time the will was made*; or (3) the laws then in force in that part of her Majesty's dominions where the testator had his domicile of origin (f). Again, the validity of the will of a British subject who died domiciled in one part of the United Kingdom leaving personal property in another part (*e. g.* A. domiciled in Scotland leaves personal property in England), depended upon the law of that part of the United Kingdom

(c) 1 Wms. Exors. p. 369, 8th ed.

(d) *Ibid.* p. 371.

(e) *Ibid.* p. 372.

(f) 24 & 25 Vict. c. 114, s. 1.

where the testator was domiciled at his death. But such a will, if invalid as to *form* by the law of the domicile, will now be valid in all cases of death after the 6th August, 1861, provided it be executed in the form required by the laws for the time being in force in that part of the United Kingdom *where it was made* (g).

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#### SECTION IV.—*The Rights and Obligations of the Executor.*

The rights and obligations of the executor may be dealt with under two heads:—(A) Rights and obligations vested in or binding upon the executor by reason of his being regarded by law as the representative of the deceased; and (B) Rights and obligations vested in or binding upon the executor by reason of his being regarded by law as a trustee of the personal estate of the deceased for the benefit of the creditors, legatees, and (in some instances) next of kin of the deceased.

In this section we shall confine our attention to cases where the appointment of the executor is *absolute*: where it is *qualified*, the rights and obligations are to the same extent limited.

##### A. *The Rights and Obligations of the Executor as Representative of the Deceased.*

When a person dies *testate*, having appointed an executor, all the rights which constitute his personal estate, and all the obligations which bind his personal representatives (h), *immediately* vest in and become binding upon the executor. To the extent of these rights and obligations the executor becomes clothed with the legal *persona* of the deceased, or, in the language of English law, becomes the *representative* of

(g) 24 & 25 Vict. c. 114, s. 2. (h) See *supra*, Pt. II., Chaps. II., III.

the deceased; and he can only divest himself of this character by renouncing probate of the will *before he has done any acts which amount to an administration* (i).

What has already been said respecting the almost unlimited powers of the administrator in dealing with the personal estate (k)—which are the natural consequence of the principle that he is the representative of the deceased,—and also what has been said respecting the limitation of the personal liability of the administrator to the amount of the personal estate (l), applies to executors equally with administrators. Also co-executors, like co-administrators (m), are regarded in law as but one person.

Probate of the will is merely authentic evidence of the validity of the will; it confers no new rights upon the executor, for all the rights of the executor, as representative of the deceased, are conferred upon him exclusively by the will of the deceased (n). Accordingly, the executor may exercise almost any of these rights before he has proved the will. “Thus he may seize and take into his hands any of the testator’s effects, and he may enter peaceably into the house of the heir for that purpose, and to take specialties and other securities for the debts due to the deceased. He may pay or take releases of debts owing to the estate; and he may receive or release debts which are owing to it; and distrain for rent due to the testator. And if before probate the day occur for payment upon bond made by or to the testator, payment must be made to or by the executor, though the will be not proved, upon like penalty as if it were. So he may sell, give away, or otherwise dispose at his discretion of the goods and chattels of the testator before pro-

(i) 1 Wms. Exors. p. 280, 8th ed. As to acts which amount to an administration, see *ibid.* p. 282.

(k) *Supra*, p. 100.

(l) *Supra*, p. 100.

(m) *Supra*, p. 101.

(n) 1 Wms. Exors. p. 297, 8th ed.

bate" (o); and "although he should die, after any of these acts done, without proving the will, yet do these acts so done stand firm and good" (p).

He cannot, however (except in a few cases (q)), enforce his rights as executor by actions until he has proved the will; for he may be required to prove that he is the executor of the deceased, either at the trial or sometimes at an earlier stage of the proceedings, and this he can only do by producing the probate of the will. But he may *commence* actions before probate, and the proceedings will hold good provided he has proved the will by the time he is required to produce the probate (r).

*B. Rights and Obligations of the Executor as Trustee for the Creditors, Legatees, and (in some cases) Next of kin of the Deceased.*

Although the executor, as representative of the deceased, has vested in him an almost unlimited power of dealing with the personal estate as he pleases, yet he is accountable, as trustee, to the creditors, legatees, and (in some cases) the next of kin of the intestate, for the manner in which he exercises that power. He ought to exercise it for the purpose of duly administering the estate; *i.e.*, (1) realizing the estate, (2) discharging the obligations, (3) paying the legacies, and (4) (if the legacies do not exhaust the assets) distributing the residue—except in cases where the executor is beneficially entitled to such residue (s).

(o) 1 Wms. Exors. p. 307, 8th ed.

(p) *Ibid.* p. 308.

(q) *I. e.*, cases where the executor has actually been in possession of property which is the subject of dispute. For the actual possession is *primâ facie* evidence

of the right of the executor to the property, without reference to the circumstances under which it was obtained. *Ibid.* p. 310.

(r) *Ibid.* pp. 309, 311.

(s) See *post*, p. 225.



### I. *Realization of the Estate.*

What has been said respecting realization by the administrator of an intestate's estate, and his liability for devastavit (*t*), applies equally to realization by the executor of the estate of his testator. But if the will contain any specific legacies (*u*) the executor ought not to convert the property specifically bequeathed unless the rest of the estate be insufficient for the discharge of the obligations. Also, by a recent statute (*x*), an executor may, if he think fit, accept any composition, or any security, real or personal, for any debt, or for any property claimed, and may allow any time for payment of any debt; and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate; and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him seem expedient, without being responsible for any loss occasioned by any act or thing so done by him in good faith (*y*). This provision does not extend to administrators (*z*).

### II. *Discharge of Obligations.*

By a recent statute it is provided that "an executor may pay or allow any debt or claim on any evidence that he thinks sufficient" (*a*); this provision does not extend to administrators (*b*), and, accordingly, executors have a wider discretion than administrators in deciding whether the existence of an obligation has been sufficiently proved. In other

(*t*) See *supra*, p. 102.

(*u*) See *post*, p. 222.

(*x*) 44 & 45 Vict. c. 41.

(*y*) 44 & 45 Vict. c. 41, s. 37 (2).

Sect. 71 of this Act repeals 23 & 24 Vict. c. 145, s. 30, which contained similar provisions.

(*z*) See *Re Clay and Tetley*, 16 Ch. D. 3.

(*a*) 44 & 45 Vict. c. 41, s. 37 (1). Sect. 71 of this Act repeals 23 & 24 Vict. c. 145, s. 30, which contained the same provision.

(*b*) See *Re Clay and Tetley*, *supra*.

respects, what has already been said concerning the discharge of obligations by administrators (*c*) applies also to discharges by executors. Thus, in paying debts, the executor must observe the rules of priority already given (*d*) (the expenses of taking out probate being of course substituted for those of taking out letters of administration), otherwise he will be personally liable for those which remain unpaid in consequence of such neglect; he may deduct his own debt before paying others in the same degree (*e*); he may become personally liable by an admission of assets (*f*), or by distributing the residue amongst the legatees or next of kin, when debts of which he was ignorant remain unpaid—although in such cases he may compel the legatees or next of kin to refund the amount (*g*)—unless he has protected himself by giving notice for creditors in accordance with 22 & 23 Vict. c. 35, s. 29 (*h*); he may make himself personally liable by a promise in *writing* to “answer damages out of his own estate” (*i*); and he may be protected from liability in respect of rents or covenants in leases, &c., under the provisions of 22 & 23 Vict. c. 35, ss. 27, 28 (*k*).

What has been said respecting proceedings in bankruptcy, where an *intestate* dies insolvent (*l*), applies equally to the case of the insolvent dying *testate*—“executor” being substituted for “administrator.”

### III. *The payment of Legacies.*

After paying the debts and discharging the other obligations which are binding upon him as executor, and after deducting any expenses which he may have paid out of his own pocket in administering the estate (*m*), the executor

(*c*) *Supra*, p. 103.

(*d*) *Supra*, p. 104.

(*e*) *Supra*, p. 105.

(*f*) *Supra*, p. 106.

(*g*) *Supra*, p. 106.

(*h*) *Supra*, p. 106.

(*i*) *Supra*, p. 107.

(*k*) *Supra*, p. 107.

(*l*) *Supra*, p. 108.

(*m*) Like an administrator, an

must carry out the intention of the testator by paying the legacies bequeathed by the will.

The legatee has no right *in rem* to anything bequeathed to him, even though the legacy may be some specific article—as a piece of plate—until it has been handed over to him, or he has been allowed to take it, by the executor. He merely acquires by the will a right *in personam* against the executor that the legacy shall be paid, provided there be sufficient assets left after the obligations are discharged (n). This right to payment of the legacy may either *rest* in the legatee from the moment of the testator's death, in which case the legacy is said to be a *vested* legacy, or it may not vest in him until *some future time* specified in the will, in which case it is, in the meantime, called a *contingent* legacy. The difference is of much importance, for if the legacy be *vested* and the legatee die immediately after the testator's decease, the right to the legacy will pass to the personal representatives of the legatee; but if it be contingent, and the legatee die at any moment before the time specified for the vesting of the legacy, the personal representatives of the legatee will have no right to the legacy, and the legacy will be said to *lapse*. Whether a legacy be vested or contingent depends of course upon the intention of the testator expressed in the will, and in case the words of the will leave any doubt as to such intention, the Courts (o) will construe the will and endeavour to ascertain the true intention. The time when a legacy becomes *vested* must be carefully distinguished from the time when it becomes *payable*. It is obvious that a legacy cannot become payable until it vests in the legatee, for until that

executor is not allowed by law to make any profit for himself out of the administration, therefore he cannot charge for his time and work in administering, *unless expressly authorized so to do by the will itself*.

(n) See 2 Wms. Exors. p. 1378, 8th ed.

(o) The Chancery Division has jurisdiction in construing wills. 1 Wms. Exors. p. 298, 8th ed.; 36 & 37 Vict. c. 66, s. 34.

time the legatee has no right whatever to the legacy; but, on the other hand, legacies often vest before they become payable. All legacies, for instance, which are given unconditionally (*e. g.*, "I bequeath the sum of 1,000*l.* to B.") vest in the legatee from the moment of the testator's death, but they do not become payable until the expiration of a year after the testator's death. For it is an established rule of law, that until the expiration of that period the executor cannot be compelled to pay legacies—even though the testator may have left a direction in his will that they shall be paid at an earlier period, *e. g.*, "within six months after my death" (*o*). The object of this rule is merely to give sufficient time to the executor for the realization of the estate and payment of the debts before the legatees can legally demand payment of their legacies: accordingly, there is nothing to prevent an executor from paying legacies before the expiration of the year, but he *cannot be compelled* to pay them before that period (*o*).

The executor must, with some exceptions, pay a duty in respect of each legacy, or share of residue handed over by him; such duty being deducted from the legacy, &c., in respect of which it is payable (*p*).

We have seen that a contingent legacy lapses in case the legatee dies before it vests. A lapsed legacy falls into the residue of the estate, and is disposed of by the executor as part of the residue (*q*). As a general rule, a legacy also lapses in case the legatee dies before the testator, for, until the death of the testator, a will has no legal effect, and therefore can confer no right upon the legatee which can pass at his death to his representatives.

To this general rule an important exception has been introduced by the Wills Act (*r*), which provides that where a legatee is "*a child or other issue*" of a testator, and the interest bequeathed by the will is not determinable at or before the

(*o*) 2 Wms. Exors. p. 1393,  
8th ed.

(*p*) See Appendix.

(*q*) See *post*, p. 225.

(*r*) 7 Will. IV. & 1 Vict. c. 26,  
s. 33.

death of the legatee, and the legatee shall die in the lifetime of the testator leaving issue, *and any of such issue shall be living at the death of the testator*, the legacy shall not lapse, but shall take effect as if the death of the legatee had happened *immediately after* the death of the testator, unless a contrary intention shall appear by the will (s).

Where a legacy is given to two or more *joint tenants*, and one dies before the testator, the share of the person so dying will not lapse, and the survivor or survivors will be entitled to it. But where a legacy is given to two or more as *tenants in common*, the rule is that the share of a legatee, who dies before the testator, lapses, unless the legacy be given to a *class* (t), *e. g.*, if a legacy be given to A. and B. as tenants in common, and B. dies before the testator, B.'s share will lapse; but if a legacy be given to *the children* of A. as tenants in common, and one of A.'s children dies before the testator, his share will not lapse, and the whole legacy will be divisible amongst the children of A. who are living at the death of the testator.

In some cases, where a testator bequeaths a legacy to his creditor, the creditor will not be entitled to demand payment of both the debt and the legacy. In these cases the debt is said to be satisfied by the legacy. The general rule on this subject has been thus stated:—"It is a rule established in the courts of equity that where a debtor bequeaths to his creditor a legacy *equal* to, or *exceeding* the amount of, his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt" (u). But the leaning of the Courts has been against this rule, and minute circumstances have been considered sufficient grounds for supporting

(s) For other rules of construction introduced by the Wills Act, see *post*, pp. 241 *et seq.*

(t) See notes to *Elliot v. Daven-*

*port*, Tudor's L. C. in Real Prop. and Conv. 910, 912, 3rd ed.

(u) 2 Wms. Exors. p. 1302, 8th ed.

exceptions to it. Thus, where the debt was not contracted until after the making of the will, it was held not to be satisfied by the legacy, for the testator could not have intended to satisfy a debt which was not in existence (*x*); so if the legacy be less in amount than the debt (*y*), or contingent (*z*), or of a different nature, as where the testator is indebted by bond and bequeaths an interest in land to his creditor (*a*),—the debt will not be satisfied by the legacy. The presumption of satisfaction may also be rebutted by other parts of the will, *e. g.*, where some particular purpose is expressed as the ground of the bequest (*b*), or where there is an express direction in the will for payment of *all debts and legacies* (*c*).

Where a testator is under an obligation by agreement or settlement to provide portions for his children, and he makes a provision for them by his will, it is an established rule that such testamentary provision shall *primâ facie* be presumed to be a satisfaction or performance of the obligation (*d*). Accordingly, the children cannot demand payment of the portion under the agreement or settlement, and also that given by the will—they cannot, in other words, claim *double* portions. The Courts have so strenuously set their faces against double portions that but few exceptions have been made to the rule. “The presumption of satisfaction is indeed so strong that it is difficult to say what circumstances of variation between the portion and the legacy will be sufficient to entitle the child to both” (*e*).

(*x*) *Cranmer’s Case*, 2 Salk. 508.

(*y*) *Graham v. Graham*, 1 Ves.

sen. 262.

(*z*) *Nicolls v. Judson*, 2 Atk. 300.

(*a*) *Eastwood v. Vinke*, 2 P. Wms. 614; *Richardson v. Elphinstone*, 2 Ves. jun. 463.

(*b*) *Matthews v. Matthews*, 2 Ves.

sen. 635; *Chancey’s Case*, 1 P. Wms. 408.

(*c*) *Chancey’s Case*, 1 P. Wms. 410.

(*d*) 2 Wms. Exors. p. 1306, 8th ed.

(*e*) Wms. Personal Prop. p. 452, 13th ed.

The dislike of the courts of equity to double portions has led to the establishment of a similar rule in cases where a testator makes a provision for a child by will, and subsequently advances a portion to the same child. The rule in such cases is, that the advance of the portion is a complete *ademption* of the legacy bequeathed by the will, if the amount of the advance be equal to, or exceed, the amount of the legacy; an *ademption pro tanto* if the amount of the advance be less than that of the legacy (*f*). For example, A. by his will bequeaths a legacy of 1,000*l.* to his son B.; afterwards, on B.'s marriage, A. settles 1,000*l.* upon him; then A. dies. The legacy of 1,000*l.* is adeemed by the settlement of 1,000*l.*, and accordingly B. cannot demand payment of the legacy from A.'s executor. But supposing A. had only settled 500*l.* on B., then the legacy would only have been adeemed to the extent of 500*l.*, and so, at A.'s death, B. could have compelled A.'s executor to pay him the remaining 500*l.* This rule applies, not only to cases of legacies to children, but also where the testator is *in loco parentis* to the legatee—where, for instance, the legatee is the *adopted* child of the testator. “The proper definition of a person *in loco parentis* to a child is, a person who *means* to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child” (*g*).

Legacies are of three kinds, namely, *general*, *specific*, and *demonstrative*.

(1) *General legacies*.—“A legacy is general when it is so given as *not* to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind” (*h*).

For instance, “I bequeath to A. a diamond ring,” or “the

(*f*) 2 Wms. Exors. p. 1338,  
8th ed.

(*g*) *Ibid.* p. 1344.  
(*h*) *Ibid.* p. 1163.

sum of 1,000*l.*," or "*a* horse," would be a bequest of a general legacy. The intention of the testator is that A. should have a diamond ring, 1,000*l.*, or a horse, as the case may be, and if at his death there are no diamond rings, or no horses amongst his effects, or if his property does not consist of money, yet his intention can be carried out by the executor purchasing a ring, or horse, for the legatee, or by realizing the property and raising the 1,000*l.* for him.

(2) *Specific Legacies*.—"A legacy is specific when it is a bequest of a specified part of the testator's personal estate" which is distinguished from all other parts (*k*).

For example, "I bequeath to A. the diamond ring presented to me by X.," or "the 100*l.* consols now standing in my name at the Bank of England," or "my horse Buffoon," would be a bequest of a specific legacy. The intention of the testator can only be carried out by the particular ring, or consols, or horse, being handed over to the legatee; if therefore, before his death, the testator has given the ring to some one else, or sold the consols, or the horse, the legacy entirely fails, just as if it had been expressly revoked. In such cases the legacy is said to be adeemed by the act of the testator in his lifetime; the legacy would of course be also adeemed if the thing bequeathed were destroyed, or otherwise had ceased to exist at the testator's death.

(3) *Demonstrative Legacies*.—A demonstrative legacy is a bequest of a certain quantity with a direction that it shall be paid out of a specific fund (*l*).

For example, "I bequeath to A. the sum of 1,000*l.*, to be paid out of the 2,000*l.* consols now standing in my name at the Bank of England," is a demonstrative legacy. The intention is that A. should have a sum of 1,000*l.*, even though

(*k*) 2 Wms. Exors. p. 1163,  
8th ed.

(*l*) See 2 Wms. Exors. p. 1165,  
8th ed.



the specific fund may have ceased to exist at the time of the testator's death; accordingly, if the testator disposed of the 2,000*l.* consols in his lifetime, the legacy would not be thereby adeemed, but the executor would be obliged to pay it out of the general assets, just as if it had been a general legacy. But it is also the intention that the legacy should, as far as possible, be paid out of the specific fund, and the result is, that if the specific fund be in existence at the death of the testator, the executor must apply it in paying the demonstrative legacy *in full* before any part of it can be applied in paying other legacies.

In all properly drawn wills a *residuary legatee* is always appointed. A residuary legatee, as the name implies, is a legatee to whom is given the residue of the assets after the obligations have been discharged, and all specific, demonstrative, and general, legacies have been paid. The interest of the residuary legatee vests from the moment of the testator's death (*m*).

In case the assets are insufficient to pay all the legacies in full, the executor must distribute the assets amongst the legatees in the following manner:—

(1) He must pay the specific legacies in full. For specific legacies have priority over general legacies (*n*).

(2) He must pay the demonstrative legacies in full out of the funds specified for their payment (*o*). If, however, the specific fund has been disposed of by the testator during his lifetime, or proves insufficient to satisfy the legacy charged on it, the whole, or part, of the legacy, as the case may be, must be paid out of the general assets, and in this case is on the footing of a general legacy (*p*).

(*m*) 2 Wms. Exors. p. 1460, 8th ed. *Livesay v. Redfern*, 2 Y. & C. 90.

(*p*) *Roberts v. Pocock*, 4 Ves.

(*n*) *Brown v. Allen*, 1 Vern. 31.

150; *Attwater v. Attwater*, 18 Beav.

(*o*) *Acton v. Acton*, 1 Meriv. 178; 330.

(3) He must, as a general rule, distribute the residue of the assets amongst the general legatees in proportion to the amounts of their legacies. For, as a general rule, no priority is allowed amongst general legatees, and their legacies must, therefore, abate proportionally (*q*). If, for instance, a legacy of 1,000*l.* be given to A., and one of 500*l.* to B., and, after paying specific and demonstrative legacies the residue of the assets be 300*l.*, A. will be entitled to 200*l.*, and B. to 100*l.*; in other words, A.'s legacy will abate to the extent of 800*l.*, and B.'s to the extent of 400*l.*—for 800*l.* bears the same proportion to 1,000*l.* as 400*l.* does to 500*l.*

But the general rule does not apply where a general legacy is given in consideration of a debt owing to the legatee, or of the relinquishment of any right or interest, as of her dower by a widow; for such a general legacy must be paid *in preference to the other general legacies*, which are mere *bounties* (*r*), *i. e.*, not given for any valuable consideration.

Of course the will may express an intention that one general legacy shall have priority over another (*s*), and such intention must be carried out by the executor.

It must be observed, that if a general legacy be given to the executor he will not be entitled to retain it and thus pay himself in full, as in the case of a debt due to him (*t*), but his legacy must abate in the same proportion as the others (*u*).

In case there are not sufficient assets to satisfy the debts without resorting to property specifically bequeathed, or to funds charged with the payment of demonstrative legacies, the executor must apply such property or funds in the payment of the debts, and the specific and demonstrative legacies

(*q*) 2 Wms. Exors. p. 1370, 668.

8th ed.

(*t*) *Supra*, p. 105.

(*r*) *Ibid.*

(*u*) 2 Wms. Exors. p. 1365,

(*s*) *Marsh v. Evans*, 1 P. Wms. 8th ed.

must abate proportionally (*x*). But this is the only case where such legacies are liable to abate.

#### IV. *Distribution of the Residue after Payment of Legacies.*

We have now to consider what becomes of the residue of the assets which may remain in the hands of the executor, after paying specific, demonstrative, and general legacies, in case no residuary legatee be appointed by the will.

The old law was, shortly, as follows:—

Where no executor had been appointed by the will, the next of kin were entitled to have the residue distributed amongst them, in the same manner as if the testator had died intestate. Where an executor had been appointed, he was *at law* entitled to the whole of the residue as beneficial owner, just as if it had been expressly bequeathed to him; but *in equity* he was considered a trustee for the next of kin—or, if there were no next of kin, for the Crown—“in all cases where a necessary implication or strong presumption has appeared, that the testator meant to give only the *office* of executor, and not the beneficial interest in the residue” (*y*).

The old law respecting the right of the executor to the residue has been altered by 11 Geo. IV. & 1 Will. IV. c. 40. Section 1 of this Act provides that when any person shall die after the 1st of September, 1830, “having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by courts of equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statutes of Distribution (*z*), in respect of any residue not expressly disposed of,

(*x*) 2 Wms. Exors. p. 1377,  
8th ed.

(*y*) 2 Wms. Exors. p. 1481,  
8th ed.

(*z*) *Supra*, p. 108.

unless it shall appear by the will, or any codicil thereto, that the person or persons so appointed executor or executors, was or were *intended to take such residue beneficially*." Thus, in all cases to which this Act applies, the next of kin will be entitled to the residue *unless a contrary intention appears by the will*, whereas, under the old law, the executor was beneficially entitled *unless a contrary intention appeared by the will*: in other words, under the old law the executor was *prima facie* entitled; under the new law the next of kin are *prima facie* entitled. The 2nd section of the Act provides that nothing therein contained "shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled, *in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions*, in respect of any residue not expressly disposed of." Thus, it appears that this Act has made no alteration in the law except in cases where the testator *has left next of kin*. Accordingly, if there be no next of kin, the old law will apply, and the executor will be entitled beneficially to the residue as against the Crown, unless it appear by the will that the testator did not intend the executor to take beneficially (a).

The general rule is, that all questions relating to the construction of a will of personal estate must be decided in accordance with the law of the country where the testator was domiciled at the time of his death (b); *e.g.*, A. dies domiciled in France, having by will disposed of personal property in England; the English Courts, if called upon to construe the will, must apply to it the rules of construction recognised by the law of France. But by a recent Act (c) it

(a) *Read v. Stedman*, 26 Beav. 495.

(b) *Enohin v. Wylie*, 10 H. L. Cas. 13.

(c) 24 & 25 Vict. c. 114.

has been provided that the construction of the will of any *British subject*, who dies after the 6th August, 1861 (*d*), shall not be "altered by reason of any subsequent change of domicile" of the testator (*e*). It seems, therefore, that such a will must be construed according to the law of the testator's domicile at the time he made the will.

In conclusion, it must be mentioned that if a person, who is neither executor nor administrator, intermeddles with the personal estate of the deceased in any manner which is calculated to lead other persons to believe that he has been appointed executor (*e. g.*, using, selling, or giving away goods, or receiving payment of a debt), he thereby makes himself what is called in law "an executor of his own wrong," or more usually, "an executor *de son tort*" (*f*).

But of course acts of mere kindness or necessity will not have this effect, *e. g.*, feeding cattle, or providing necessities for the deceased's children (*g*).

The executor *de son tort* has all the liabilities without any of the rights of an executor (except that he is protected in all acts, not for his own benefit, which an executor may rightfully do, as paying debts in due order of priority), and so he *can be sued* by a creditor, but *cannot sue*, nor can he retain a debt, due to him from the deceased, out of the assets which may be in his hands (*h*).

(*d*) Sect. 4.

(*e*) Sect. 3.

(*f*) 1 Wms. Exors. p. 261,  
8th ed.

(*g*) *Ibid.*, p. 265; 2 Steph. Com.  
p. 200, 10th ed.

(*h*) 1 Wms. Exors. p. 271, 8th  
ed.; 2 Steph. Com. p. 200, 10th ed.

## CHAPTER III.

THE SUCCESSION OF THE ADMINISTRATOR *CUM TESTAMENTO ANNEXO*.

IF no executor be appointed by the will, or if the appointment of an executor fail, the testator is said to die *quasi intestatus* (a), and a person will be appointed by the Probate Division to administer the estate in accordance with the provisions of the will. Such persons are called administrators *cum testamento annexo*.

The appointment of an executor fails where the person appointed (1) dies before the testator, or before he has proved the will, or (2) refuses to act, or (3) is incapable of acting (b).

In the present chapter it seems only necessary to explain briefly (1) what persons are entitled to administration *cum testamento annexo*, and (2) the manner of their appointment. The executor derives all his authority from his appointment by the testator; the administrator *cum testamento annexo* derives all his authority from his appointment by the Court, and in this respect resembles an ordinary administrator; but from the date of his appointment his rights and obligations differ little from those of the executor, except that he has not such a wide discretion as to releasing debts, &c. (c), and, not having been appointed by the will, he can, of course, have no beneficial right to any residue not disposed of by the will, unless, at least, he be next of kin as well as administrator.

(a) 2 Inst. 397.

(b) *Supra*, p. 206.(c) *Supra*, p. 215.

SECTION I.—*The Persons entitled to be appointed Administrators cum testamento annexo.*

The Statute of Administration, 31 Edw. III. stat. 1, c. 11 (*d*), relates only to cases of intestacy, and 21 Hen. VIII. c. 5, s. 3, only provides for cases where a person dies intestate, or where *the executors named in a will refuse to act*. Accordingly, in all cases where no appointment of an executor had been made by the will, and in all cases where such appointment had been made and had failed, *except where the executor had renounced*, the Ecclesiastical Courts were free to exercise their own discretion in appointing administrators *cum testamento annexo*. In such cases it became an established rule of practice to grant administration to the claimant who had the greatest interest in the estate of the deceased, unless the peculiar circumstances of the case made it expedient to depart from the rule. Hence, the residuary legatee was preferred to the next of kin. "And so strong has been the effort of the Courts that the right of administration should follow the right of property, that although, in the case of the appointed executor's renunciation, the letter of the statute [21 Hen VIII. c. 5, s. 3] expressly directs the ordinary to grant administration to the next of kin, yet the spirit of the Act has been held, both by common lawyers and civilians, to exclude the next of kin where there is a residuary legatee; on the ground that in such cases the next of kin have no interest" (*e*). Accordingly it seems now to be the established rule that, in the absence of peculiar circumstances, administration *cum testamento annexo* shall be granted in the following order (*f*).

1. To the residuary legatee.

2. To the next of kin if there be no residuary legatee, or if he decline the office.

(*d*) *Supra*, p. 83.

(*f*) See *ibid.*, p. 473.

(*e*) 1 Wms. Exors, p. 470, 8th ed.

3. To a legatee, if there be no next of kin or if the next of kin decline the office.

4. To a creditor.

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SECTION II.—*The Appointment of the Administrator cum testamento annexo.*

Application for a grant of letters of administration *cum testamento annexo* must be made either to the Principal Registry of the Probate Division or to a District Registry, just as in the case of applications for grants of general letters of administration (*g*).

The grant is made in the following form :—

Be it known that A. B., late of        in the county of       , deceased, who died on the        day of       , at       , made and duly executed his last will and testament [*or will and codicils thereto*] and did therein name        [*or did not therein name any*] executor [*or as the case may be*]: And be it further known that at the date hereunder written, letters of administration with the said will [a copy of which is hereunto annexed] of all and singular the personal estate of the said deceased were granted by Her Majesty's High Court of Justice at the Principal Registry (*h*) of the Probate Division thereof, to C. D. [*insert the character in which the grant is taken (i)*], he having been first sworn well and faithfully to administer the same (*k*).

The will must be proved by the administrator *cum testamento annexo* in the same manner as though the application for probate were made by an executor (*l*).

Where an executor has proved the will and died intestate, or testate without leaving an executor capable of acting, before he has fully administered the estate, an administrator *cum testamento annexo* will be appointed to complete the administration. Such administrators are called administrators *cum testamento annexo de bonis non administratis*, their authority being limited to such part of the estate as remains unadministered.

(*g*) *Supra*, p. 95.

(*h*) *Or* District Registry.

(*i*) *I. e.*, whether C. D. was next

of kin, &c.

(*k*) 1 Wms. Exors. p. 477, 8th ed.

(*l*) *Ibid.*, p. 468.



## CHAPTER IV.

## THE SUCCESSION OF THE DEVISEE.

THE rights which (as we have seen (*m*)) constitute the real estate of a deceased person may pass by his will to the devisee, so that the devisee may, in the strict sense of the term, *succeed* to such rights, or these rights may be so altered or modified by the provisions of the will that in fact new rights are created, and the devisee rather *acquires* new rights under the will than *succeeds* to old ones. For example, the owner of an estate in fee simple in possession may simply devise "all his real estate to A."; in which case A. succeeds to all the testator's rights as owner in fee simple in possession: but on the other hand the owner, instead of devising the whole of his interest in his real estate to A., may devise it to A. for life, and after A.'s death to B. for life, and after the decease of both A. and B. to the first and other sons of A. successively in tail; in this case neither A., nor B., nor A.'s issue, can be said, strictly speaking, to *succeed* to the interests thus created by the will. There is, however, no difference between a devisee who succeeds and one who acquires new rights, as regards their title to the real property which is the subject-matter of their rights, and their liabilities to discharge the obligations of the deceased; and, accordingly, we shall use the term succession as including the acquisition of new rights under a will.

All interests in real estate devised by will vest in the devisees from the moment of the testator's death, unless a

(*m*) *Supra*, Pt. II., Chap. II. .

contrary intention appear from the provisions of the will. If such contrary intention appear, the interest in the real estate will vest in the heir-at-law of the testator during the interval between the death of the testator and the vesting of the interest, unless the will provide that during such interval it shall vest in some other person; for example, A. devises his real estate to the first son of X. who shall attain the age of twenty-one; A. dies, and at his death X. has a son aged ten: A.'s real estate immediately vests in A.'s heir, but as soon as X.'s son attains twenty-one the rights of the heir will be extinguished, and the real estate will vest in X.'s son.

The devisee (like the heir in case of intestacy) is, to the extent of the interest devised to him, directly liable to perform the obligations of the testator which, as we have seen (*n*), are binding upon the real representatives; and is also indirectly and contingently liable, to the same extent, to pay the simple contract debts (*o*). He is also, in most cases, liable to pay *succession duty* in respect of his interest in the real estate (*p*). In fact the legal position of the devisee in respect of the interest devised to him by will is much the same as that of the heir in respect of the real estate to which he has succeeded by the rules of intestate succession. We must, however, mention a few points of difference:—

1. A devisee may disclaim the interest devised to him, and thereupon all his rights and liabilities in respect of it are extinguished; but an heir cannot disclaim (*q*), so as to free himself from the liability to perform the obligations of the deceased, to the extent of the real estate to which he has succeeded.

2. We have seen that where the real estate of an intestate consists of freehold or copyhold land, the right of the heir to

(*n*) *Supra*, Pt. II., Chap. III.

(*o*) *Supra*, p. 79.

(*p*) See Appendix.

(*q*) *Supra*, p. 133.

the property is in many cases subject to the widow's right to *dower* or *freebench* (*r*). In case the testator married *before* the 1st January, 1834, and his widow survives, she has the same right to dower as against a devisee of *freehold* land as she would have had against the heir if her husband had died intestate; but where the testator has been married on or after the 1st January, 1834, the Dower Act (*s*) provides that the widow's right to dower shall be extinguished by a devise of his freehold land (*t*). And a devise of *copyhold* land has, by the rules of common law, the effect of extinguishing the right of the testator's widow to freebench (*u*).

3. The devisee of copyhold land is not regarded at law as tenant of the land until he has been admitted; before admittance his position is the same as that of a surrenderee (*v*); *i. e.*, he has merely an equitable interest (*w*). The heir, on the other hand, is, as we have seen (*x*), to most intents and purposes regarded at law as perfect tenant from the moment of his ancestor's death.

What has been said respecting the lord's rights to seize *quousque*, or absolutely, in case the heir does not appear and claim admittance, and also respecting the restrictions on that right in favour of infants, married women, lunatics and idiots (*y*), applies equally in case the devisee fails to appear and claim admittance.

We will now refer to the circumstance of the devisee happening to die before he has acquired a vested interest under the will. This may occur (1) where he dies before the testator, or (2) where he dies after the testator, but before the time fixed by the will for the vesting of the interest.

(*r*) *Supra*, p. 134.

(*s*) 3 & 4 Will. IV. c. 105.

(*t*) Sect. 4; *Lacey v. Hill*, L. R. 19 Eq. 346.

(*u*) *Ibid.*

(*v*) Wms. Real Prop. p. 430 16th ed.

(*w*) 1 Steph. Com. 639, 10th ed

(*x*) *Supra*, p. 137.

(*y*) *Supra*, p. 137.

1. Where the devisee dies in the lifetime of the testator the general rule is that the devise *lapses* (*i. e.*, the real estate devised falls into the residue of the real estate, and the heir of the devisee is not entitled to it). In this case the general residuary devisee, or if there be none, the *heir* of the testator, will be entitled to the real estate devised, as forming part of the real estate not specifically devised, unless, at least, the will provides that in the event of a devise lapsing the real estate devised shall pass to some other person. Even a devise to a person *and his heirs*, or *the heirs of his body*, did not, before the Wills Act (z), prevent a devise from lapsing, for the words *heirs* or *heirs of the body* are merely words of limitation, *i. e.*, they merely mark out the estate which the devisee would have taken had he lived (a).

The Wills Act (b) has, however, created two exceptions to the general rule, by providing that—

(1) “Where any person to whom any real estate shall be devised for *an estate tail* or an estate *in quasi tail* shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, *such devise shall not lapse*, but shall take effect as if the death of such person had happened *immediately after* the death of the testator, unless a contrary intention shall appear by the will” (c).

(2) Where any person, “being *a child or other issue of the testator*,” to whom any real estate shall be devised for any estate not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue shall be living at the death of the testator, *such devise shall not lapse*, “but shall take effect as if the death of

(z) 7 Will. IV. & 1 Vict. c. 26.

(b) 7 Will. IV. & 1 Vict. c. 26.

(a) Wms. Real Prop. p. 244,

(c) Sect. 32.

such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will" (d).

What has been said respecting legacies to *joint tenants and tenants in common* in the event of one of the legatees dying before the testator (e), applies equally to the case of a *devise* to joint tenants and tenants in common one of whom dies before the testator.

2. Where the devisee survives the testator, but dies before the time fixed by the will for the vesting of the interest, the devise always lapses, unless a contrary intention appear by the will; *e. g.*, if A. devise real estate to B. for life, and after the death of B. to the sons of X. who shall be living at the death of B. as tenants in common, the sons of X. will have no vested interest in the real estate until the death of B.; accordingly, if they all die before B. the devise to them lapses. Of course, the lapse might have been prevented by a provision in the will, that in the event of all X.'s sons dying before B. the real estate should pass to their children, or to some other person.

The nature and extent of the interest to which the devisee succeeds must, of course, depend upon the terms of the will: it may be an estate for life, or in fee simple, or in tail, and such estate may be legal or equitable, and either present or future, and may be given to the devisee for his own benefit or as trustee for another. In the case of a conveyance *inter vivos* it is necessary that certain technical terms should be used in marking out the estate which is to be granted. An estate in fee simple cannot be conveyed *inter vivos* unless it be granted to the grantee "*and his heirs*," or, if made on or after the 1st January, 1882, to the grantee "*in fee simple*" (f). And, if it be intended to grant an estate tail, *inter vivos*, the grant must be made to the grantee and his heirs, with the

(d) Sect. 33; the same rule, as we have seen, applies to legacies.

(e) *Supra*, p. 219.

(f) 44 & 45 Vict. c. 41, s. 51.

addition of words of procreation (*e. g.*, to A. and the heirs *of his body*), or, if made on or after the 1st January, 1882, to the grantee "*in tail*," or "*in tail male*," or "*in tail female*," as the case may be (*g*). Thus, a grant to A. "*and his heirs male*" or "*heirs female*" confers an estate in fee simple, for there are no words of procreation to ascertain the body out of which the heirs shall issue; so, a grant to A. "*and the issue of his body*," or to A. "*and his seed*," or "*children*," or "*offspring*," confers merely a life estate, for here the word "*heirs*" is wanting, without which no estate of inheritance can be created (*h*). But no technical words are necessary in order to confer an estate in fee simple, or in tail, by will; all that is required is, that the words used by the testator shall be sufficient to indicate his intention. Thus, a devise to A. and "*his seed*," or "*issue*," would confer an estate tail; and a devise to A. and his *heirs male* would confer an estate in tail male, "*for the addition of the word 'male,' as a qualification of heir, shows that a class of heirs, less extensive than heirs general was intended*" (*i*)—such words in a deed would only confer an estate in fee simple, for want of words of procreation. So, a devise to A. "*for ever*," or to him "*and his assigns for ever*," or a devise of *all* the testator's estate, or of *all his property*, or *all his inheritance*, would, even before the Wills Act, have conferred an estate in fee simple (*k*); but before that Act a devise to A. without any words indicating what estate A. was to take would merely have conferred an estate for life (*l*).

The reason of this difference between deeds and wills is, that the Courts, when called upon to construe wills, have always borne in mind that a testator may not have had the

(*g*) 44 & 45 Vict. c. 41, s. 51.

(*i*) Wms. Real Prop. p. 250,

(*h*) See Wms. Real Prop. p. 170, 16th ed.

16th ed.

(*k*) *Ibid.*

(*l*) *Post*, p. 240.

same opportunity of legal advice in drawing his will as he would have had in executing a deed (*m*), and have supposed that he was *inops consilii* (*n*); and accordingly it has become an established general rule that where the real intention of the testator can be gathered from the words used in the will, effect must be given to such intention, no matter what form of expression be used. But the decisions of the Courts, in applying the maxim that the intention of the testator ought to be observed, "have given given rise to a number of subsidiary rules, to be applied in making out the testator's intention; and, when doubts occur, these rules are always made use of to determine the meaning; so that the true legal construction of a will is occasionally different from that which would occur to the mind of an unprofessional reader" (*o*). Thus, it is a rule that technical terms require a technical construction, and accordingly, if a testator, who is ignorant of the meaning of technical terms, should make use of them in drawing his will, his real intention may be defeated by the rule of construction which will be applied to his will; for example, in the case of *Perrin v. Blake* (*p*), a testator declared his intention to be that his son should not dispose of his estate for a longer time than his life, and to that intent he devised the same to his son for life, and after his decease to the *heirs of the body* of his said son; and, notwithstanding the declaration of intention, it was held by the Court of Exchequer Chamber (reversing the decision of the Court of Queen's Bench) that the son took an estate tail under the will. For after giving a life estate to his son the testator had unfortunately used the technical term *heirs of the body* of his son in disposing of the remainder, and the technical

(*m*) Wms. Real Prop. p. 245,  
16th ed.

(*n*) 2 Bl. Com. p. 172.

(*o*) Wms. Real Prop. p. 245,  
16th ed.

(*p*) 4 Burr. 2579; 1 Sir W. Bl.  
672; 1 Dougl. 343.

construction of such a disposition is that the person expressed to be tenant for life takes an estate in tail. Accordingly, the son could bar the entail, and thus obtain an estate in fee simple, which of course he could dispose of for a longer period than that of his own life, and the intention of the testator would thus be defeated.

On the other hand, a good illustration of the anxiety of the Courts to give effect, as far as possible, to the testator's intention, is furnished by the application of the *cy près* doctrine to cases where the testator has devised an estate for life to an *unborn person* with an estate tail in remainder to *such unborn person's child*. The latter devise is, as we have seen (*o*), void, and therefore, in order to give effect to the intention as nearly as possible, the Courts have construed the devise as conferring an estate tail on the unborn person. But this doctrine only applies to devises of *estates tail*—such a devise of an estate in fee simple, or an estate for life, would be completely ineffectual (*p*).

We must now mention some particular rules of construction which have been established by the Wills Act (*q*).

1. Before the Wills Act came into operation, the rule was that a will of *personal* estate “spoke” as at the time of the testator's death, while a will of *real* estate spoke as at the time of its execution, *i.e.*, under a will of personal estate, all personal estate which belonged to the testator *at the time of his death* would pass; but, under a will of real estate, only such real estate as belonged to the testator *at the time of the execution of the will* would pass. Accordingly, if A. had made his will before the 1st January, 1838, leaving all his personal estate to B., and all his real estate to C., and afterwards had acquired leasehold houses and freehold houses, and

(*o*) *Supra*, p. 184.

16th ed.

(*p*) See Wms. Real Prop. p. 315,

(*q*) 7 Will. IV. & 1 Vict. c. 26.



then died without having revoked or altered his will, the leasehold houses would have passed under the will, and B. would have been entitled to them as forming part of the personal estate, but the freehold houses would have descended upon A.'s heir-at-law as real estate undisposed of by the will. The reason of this distinction was that a will of real estate was regarded as a present conveyance to take effect in the future (*r*). This distinction has been abolished by the Wills Act (*s*) as to all wills made on or after the 1st January, 1838, which provides, that "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear from the will" (*t*).

2. Another consequence of a will of real estate being regarded as a present conveyance was that a general residuary devisee was, in effect, a specific devisee of the residue of the real estate, not otherwise disposed of, at the time the will was executed. If, for instance, A., being owner in fee simple of two farms, Blackacre and Whiteacre, had devised "Blackacre" to B., and "all the residue of his real estate" to C., and B. had died in the lifetime of A., C. would not have been entitled, as residuary devisee, to Blackacre; for such a devise would have been construed as a present conveyance of Blackacre to B., and of all the residue of A.'s real estate *except* Blackacre to C.; and Blackacre would have descended on A.'s heir at law. But, as to all wills made on or after the 1st January, 1838, the Wills Act now provides (*u*), that "unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained,

(*r*) Wms. Real. Prop. p. 243,  
16th ed.

(*t*) Sect. 24.

(*u*) Sect. 25.

(*s*) 7 Will. IV. & 1 Vict. c. 26.

which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

3. Before the Wills Act came into operation it was the established rule that a devise of real estate *without any words of limitation*, and without any words from which a limitation could be implied, conferred merely a life estate upon the devisee, and accordingly the intention of testators was often defeated in consequence of their ignorance of this rule of construction (*v*). Thus, a devise of "my farm at Blackacre" to A. would merely give A. a life estate, although there could be little doubt that the testator when he used these words intended to give, and thought that he was giving to A. the same interest as he himself had in Blackacre.

This rule of construction has been abolished (in the case of all wills made on or after the 1st January, 1838) by the Wills Act (*w*), which provides, that "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will" (*x*).

4. Before the Wills Act came into operation, a devise of real estate to A., "and *in case he shall die without issue*" to B., was construed to mean that the estate went over to B., not only in case A. had no issue living at the time of his death, but also in case he died leaving issue and such issue failed at any time afterwards—if, for instance, A. died leaving one child surviving and no other issue, the estate would go over to B. in case A.'s child died without leaving issue. By such

(*v*) See Wms. Real Prop. p. 23,  
16th ed.

(*w*) 7 Will. IV. & 1 Vict. c. 26.  
(*x*) Sect. 28.

a construction, the devise was held to be a gift to A. and his issue with a remainder over to B., that is, a devise of an estate tail to A. (y). The result was that A. might at any time have barred the entail, and then, whether A. died with or without issue, B.'s remainder would, of course, have been destroyed, and, as it would seem, the intention of the testator would have been defeated. However, in the case of all wills made on or after the 1st January, 1838, the Wills Act (z) now provides that in any devise of real estate the words "die without issue," or "without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, *shall be construed to mean a want or failure of issue in the lifetime or at the death of such person*, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise (a).

5. Formerly, where a testator made a *devise* of all his "lands and tenements" to A., having at the time *only leasehold property*, such leasehold property would have passed to A., for otherwise there would have been nothing upon which the devise could have operated. But, as a general rule, if the testator had had real property as well as leasehold, only the leasehold would have passed to A. However, where the will has been executed on or after the 1st January, 1838, the Wills Act now provides that—"A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would

(y) Wms. Real Prop. p. 248,  
16th ed.

(z) 7 Will. IV. & 1 Vict. c. 26.  
(a) Sect. 29.

describe a customary copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator . . . or any of them to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will" (b).

Of course this does not alter the devolution of the leaseholds, which pass, like all other personal estate, to the executor; it is merely a legacy of the leaseholds, although the word "devise" has been used.

[This is a convenient place for mentioning two rules of construction, introduced by the Wills Act, which relate exclusively to the execution of powers of appointment by will; but it must be remembered that the persons who take interests in real or personal estate by the execution of the power do not take such interests as *devisees* or *legatees of the testator*, for they do not take under his will, but under the instrument whereby the power of appointment was conferred upon him (c). We will number them 6 and 7, so as to complete the collection of special rules of construction introduced by the Wills Act.]

6. In cases where the testator had at the time of making the will a *power of appointment*, exerciseable by will, over real or personal property, the general rule of construction adopted by the Courts, before the Wills Act, has been thus stated—"It is clearly settled that a *general* devise or bequest will not . . . operate as an execution of a power; but it is also settled that where a testator disposes of real estate, not having any other than what is subject to the power, he is in such a case to be taken as dealing with that estate; and that as to both realty and personalty, if the Court is satisfied by the manner in which the particular property is referred to, that

(b) 7 Will. IV. & 1 Vict. c. 26, s. 26.

(c) See Wms. Real Prop. pp. 333 *et seq.*, 16th ed.

the testator intended to deal with that property, the disposition will be a valid execution of the power" (*d*). Accordingly, if A., having real and personal property of his own, and a power of appointment, exerciseable by will, over other real and personal property, devised and bequeathed all his property in general terms (*e. g.*, "I devise all my real estate to B., and bequeath all my personal estate to C."), without any reference at all to the power of appointment, only A.'s own property would have passed under the will. This construction has been altered by the Wills Act (*e*), which in all cases where the will was made on or after the 1st January, 1838, provides that—"A general devise of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will" (*f*).

7. Formerly, when a testator exercised a power of appointment by will, it was necessary that the will should be executed in the manner prescribed by the instrument which conferred the power, otherwise the appointment was invalid;

(*d*) Per Lord St. Leonards, *Lake v. Currie*, 2 De G. M. & G. 547.

(*e*) 7 Will. IV. & 1 Vict. c. 26.  
(*f*) Sect. 27.

*e.g.*, such instrument might specify a certain number of witnesses, or a certain formality, as sealing. But the Wills Act (z) now provides, in all cases of wills executed on or after the 1st January, 1838, that (1) "No appointment made by will, in exercise of any power, shall be valid," unless executed in the manner prescribed by the Act (a); and (2) Every will executed in the manner prescribed by the Act shall, "so far as respects *the execution and attestation thereof*, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity" (b).

With respect to devises of real estate to trustees by testators who die *after the 14th of August, 1884*, the Intestates' Estates Act, 1884 (c), provides as follows:—

"Where any beneficial interest in the real estate of any deceased person, whether the estate of such deceased person therein was legal or equitable, is, owing to the failure of the objects of the devise, or other circumstances happening before or after the death of such person, in whole or in part ineffectually disposed of, such person shall be deemed, for the purposes of this Act, to have died intestate in respect of such part of the said beneficial interest as is ineffectually disposed of."

A peculiar difference between wills of real, and wills of personal, estate is, that the former are not required to be proved. Accordingly, if a will deal exclusively with real estate, so that no personal estate be intended to pass under it, it ought not to be proved; and in case of a dispute between the devisee and the heir of the testator as to the ownership of the land, the production of the will by the devisee will be sufficient evidence to establish his title unless the will be shown to be invalid.

(z) 7 Will. IV. & 1 Vict. c. 26.

(a) See *supra*, p. 157.

(b) Sect. 10.

(c) 47 & 48 Vict. c. 71, s. 7.

When a will deals with *both* real and personal property, the whole will must be proved (*d*) ; but, before the Court of Probate Act, 1857 (*e*), came into operation, probate of the will did not prejudice the heir of the testator, for probate was not evidence of the validity of the will so far as the will related to real estate. Accordingly, after the validity of a will had been established in the Court of Probate, it might have been disputed in subsequent proceedings relating to the real estate devised. However, the Court of Probate Act, 1857, provides, that after probate in solemn form, or where the validity of the will is otherwise decided on, the decree of the Court shall be binding on *every person interested in the real estate* (*f*), *provided such person has been cited to attend or made a party to the proceedings, or derives title under or through a person so cited or made party* (*g*).

In case the land devised be situated in the counties of Middlesex, York, or the town and county of Kingston-upon-Hull, a memorial of the will must be registered in accordance with the Registry Acts for these counties (*h*), in order to complete the title of the devisee.

The earlier of these Acts provide, that a will of land in those counties shall be adjudged fraudulent and void *as against purchasers or mortgagees for valuable consideration* unless a memorial of the will be registered—

(1) Within six months after the death of the testator, if he died within the Kingdom of Great Britain ; or

(2) Within three years after the death of the testator if he died upon the seas, or in parts beyond the seas.

(*d*) 1 Wms. Exors. p. 394, 8th ed.

(*e*) 20 & 21 Vict. c. 77.

(*f*) Sect. 62.

(*g*) Sect. 63.

(*h*) As to Middlesex, 7 Anne, c. 20, s. 8 ; as to Yorkshire and Kingston-upon-Hull, 2 & 3 Anne,

c. 4, s. 20 ; 6 Anne, c. 62 ; 8 Geo. II. c. 6, s. 15. All the Acts relating to Yorkshire and Kingston-upon-Hull were repealed by 47 & 48 Vict. c. 54, which introduced new provisions for registration in those counties, see next page.

Courts of equity, however, in construing these Acts, established the rule that if the purchaser or mortgagee had clear notice of the existence of the will before the purchase or mortgage was completed, he could not by registering the deed acquire any priority as against the devisee in respect of the equitable estate, and would therefore hold the legal estate as trustee for the devisee.

If the devisee has *not* registered the will within the six months or three years, and he, or any one deriving title under him, conveys the land to a purchaser or mortgagee, the Vendor and Purchaser Act, 1874 (*i*), provides that the conveyance shall prevail over any conveyance by the testator's heir-at-law, provided the conveyance made by the devisee is registered before that made by the heir.

This is still the law as to registration of land in Middlesex, but the Yorkshire Registries Act, 1884 (*k*), has introduced some important alterations as regards land in Yorkshire and Kingston-upon-Hull. It provides as follows—

(1) The will has priority according to *the date of the death* of the testator, if registered—

- (a) within six months of the date of the death, or
- (b) within the time which by the Act is “deemed to be” within six months of the date of the death (*l*).

(2) The will has priority according to *the date of the registration* if *not* registered within the times above specified (*m*).

The will is “deemed to be registered” within six months of the date of the testator's death under the following circumstances. Where any person claiming under a will is desirous of registering it, but is unable to do so within six months of the testator's death, he may within such six months register a *notice* of the will, containing—

(1) The date of the will.

(*i*) 37 & 38 Vict. c. 78, s. 8.

(*k*) 47 & 48 Vict. c. 54.

(*l*) Sect. 14.

(*m*) *Ibid.*



(2) The date of the testator's death.

(3) The name, description, residence, and occupation of the testator, so far as it may be set out in the will.

(4) The name, description, residence, and occupation of the person giving the notice.

(5) A description of the lands so far as they are described in the will.

This notice having been registered within the six months, the will, *if registered within two years after the date of the testator's death*, shall have priority as if it had been registered at the date of the registration of the notice; and such date shall be deemed to be the date of the registration of the will for all purposes (*n*).

The Act further provides that at any time *after* the expiration of six months from the death of the owner of the land, an affidavit of intestacy may be registered, and thereupon any assurance for *valuable consideration* made by any person who would be empowered to do so if the deceased died intestate, and duly registered, shall have priority over any will of the deceased the date of registration of which is *subsequent* to the date of registration of such assurance, unless the will be registered so as to be deemed to be within the six months prescribed by the Act (*o*).

The Act also expressly provides that no person entitled to priority under the Act in respect of any legal or equitable interest shall lose such priority merely in consequence of his having had actual or constructive notice of any unregistered will or prior unregistered assurance, except in cases of actual fraud (*p*).

Until recently, real property mortgaged to the deceased testator might have been devised, and, if not, it passed to the

(*n*) Sect. 11.

(*o*) Sect. 12.

(*p*) Sect. 14.

heir (*q*). But it is now provided that in all cases of death after the 31st December, 1881, such property shall pass to the personal representatives, like personal property, notwithstanding that the testator may have expressly devised it to some one else (*r*).

(*q*) *Supra*, p. 139.

(*r*) 44 & 45 Vict. c. 41, s. 30.

## CHAPTER V.

THE RIGHTS AND OBLIGATIONS OF THE DEVISEE OR HEIR, AND  
THE EXECUTOR, *INTER SE*.

WE must now briefly consider some of the more important rights and obligations of the devisee or heir, and the executor, *inter se*, which are the consequence of the division of the estate and of the obligations of the deceased between these two distinct classes of successors. These rights and obligations relate (1) to contracts for the purchase or sale of real estate, (2) to the payment of debts, (3) to the apportionment of rent, and (4) to emblements.

1. *Contracts for the Sale or Purchase of Real Estate*.—The devisee of the land agreed to be purchased has the same rights against the executor as the heir has against the administrator (*a*), but subject, of course, to any express provision of the will: if the land agreed to be purchased be not devised, the heir of the testator will be entitled to it just as the heir of an intestate, and will have the same right to have it paid for by the executor, provided the deceased died before the 1st January, 1878.

Where a testator devises real estate and afterwards sells it and dies before the purchase is completed, the purchase-money belongs to his personal representatives notwithstanding sect. 23 of the Wills Act (*b*), and not to the devisee (*c*). As to the power of the personal representatives to convey the estate to the purchaser, see *supra*, p. 141.

(*a*) *Supra*, p. 140.

(*c*) See *supra*, p. 201; 1 Wms.

(*b*) 7 Will. IV. & 1 Vict. c. 26. Exors. p. 666, 8th ed.

2. *Payment of Debts.*—What has already been said as to the rights and obligations of the heir and administrator, *inter se*, respecting the payment of debts (c), applies also to the rights and obligations of the devisee, heir, and executor, *inter se*, but subject to the following important exceptions:—

(1) The testator may by his will have exonerated the personal estate from its primary liability and charged his debts upon the real estate. Of course, this cannot affect the right of creditors to obtain payment out of the personal estate, but the executor will be entitled to be reimbursed, out of the real estate, the amount which he has paid to the creditors.

(2) With regard to mortgage debts and liens for unpaid purchase-money, the testator may by his will have signified “a contrary or other intention” so as to exclude the operation of Locke-King’s Act, and the Acts by which it was amended (d), and so the devisee or heir may be entitled to have such debt or lien discharged out of the personal estate (e). But it must be observed that one of those amending Acts (f) provides that, in the construction of the will of any person who may die after the 31st December, 1867, a general direction that the debts, or all the debts, of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by Locke-King’s Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator’s debts or debt, charged by way of mortgage on any part of his real estate.

(3) Only the general personal estate which has not been bequeathed at all by the will, or has merely been bequeathed by way of residue, is primarily liable for the payment of

(c) *Supra*, p. 141.

(d) *Supra*, p. 142.

(e) The legatee of leaseholds is,

in this respect, in the same position as the heir or devisee of realty.

(f) 30 & 31 Vict. c. 69.

debts; and, where such part of the personal estate is insufficient to satisfy the debts, the personal estate bequeathed generally and specifically, and the real estate devised, or which has descended on the heir, is liable to make good the deficiency in the following order—

(i) Real estate devised for the purpose of paying debts. Such a devise makes the devisee a trustee of the real estate for the creditors, to the extent of their debts.

(ii) Real estate undisposed of by the will, or the devise of which has lapsed or otherwise failed, so that the real estate descends to the heir. But where a devise of real estate *charged with debts* fails, such real estate is only liable in the same order as it would have been if the devise had not failed, *i. e.* under (iii).

(iii) Real estate devised specifically or by way of residue (*f*), but charged with the payment of debts. Real estate so devised is liable in the same order in the event of the devise lapsing or otherwise failing (*g*).

(iv) General legacies. Where there are several general legacies they are liable *pro ratâ*, and so they must all abate proportionally (*h*).

(v) Specific and demonstrative legacies, and real estate devised either specifically or by way of residue. All such legacies and devises are liable *pro ratâ*.

(vi) Real and personal property over which the testator had a *general* power of appointment; but only if, and so far as, he had actually exercised such power, by deed or will, in favour of volunteers.

This order “has been established out of a regard to the testator’s intention. The general personal estate was long the only fund to which those creditors who had not specialties

(*f*) *Hensman v. Fryer*, L. R. 3 Ch. App. 420; *Lancefield v. Iggulden*, L. R. 10 Ch. App. 136.

(*g*) *Wood v. Ordish*, 3 Sm. & Giff. 125; *Stead v. Hardaker*, L. R. 15 Eq. 175.

(*h*) *Supra*, p. 224.

binding the heir could resort; and besides, cash, stock, and moveables come first to hand, and are the most readily applicable, and are the funds out of which people in their lifetime usually pay their debts. It cannot, therefore, be matter of surprise that, in the absence of any express direction to the contrary, the general personal estate should be held primarily liable to the payment of the debts of the deceased. Next after that, any special fund set apart by the testator would naturally come. The heir not being a beneficiary within the testator's intention, lands descended to him would properly follow next in the order of application. But lands charged with the payment of debts would, of course, be applicable before legacies bequeathed, or property specifically given and not so charged. Again, there seems a more direct intention to benefit a specific devisee or legatee than to benefit a mere pecuniary legatee (*i*). Pecuniary legacies must, therefore, go unpaid rather than specific devises or bequests be touched. These, however, must be resorted to for the payment of the debts as a last resource, whilst lands over which the testator has exercised a general power of appointment are, in favour of creditors, considered as supplementarily applicable after the whole of the testator's own property has been exhausted" (*j*).

The Inheritance Act provides (*k*), as we have seen (*l*), that where a testator (who dies after the 31st December, 1833) devises real estate to his heir, the heir takes as purchaser under the will, and not as heir of the testator. Accordingly, in cases coming within that Act, the heir who is devisee is in the same position as any other devisee as respects the order of the liability of the real estate for payment of debts, *i. e.* his real estate will be liable under (iii) or (v), and not under

(*i*) *I. e.*, a general legatee.

(*j*) *Wms. Real Assets*, 108.

(*k*) 3 & 4 Will. IV. c. 106, s. 3.

(*l*) *Supra*, p. 122.

(ii), as it would be if he were regarded as taking by descent as heir.

It is provided by a recent Act (*m*), that where real estate is devised and *charged with the payment of debts or legacies*, the *executor* shall have power to sell or mortgage such real estate for the purpose of raising such debts or legacies (*n*), but only in case (1) the real estate is not devised to trustees; and (2) the devise is not made in fee simple, or in tail, or for the testator's whole estate and interest (*o*). This Act was passed in consequence of several decisions which recognised the doctrine that if a testator charges his real estate with the payment of debts, such a charge gives by implication a power to his executors to sell his real estate for the payment of debts (*p*)—a doctrine which was regarded by two eminent authorities (*q*) as inconsistent with legal principles (*r*).

3. *Apportionment of Rent*.—What has already been said respecting apportionment of rent between the heir and administrator (*s*) applies also to an apportionment between the devisee, or heir, and the executor; unless a contrary intention appear by the will. For the testator may by his will direct that the whole of the rents shall go with the lands to the devisee or heir, or he may dispose of each portion of the rent separately, and give each to any person or persons as he pleases (*t*).

4. *Emblements*.—The rule is that the devisee, and not the executor, is entitled to all emblements growing on the land devised, unless a contrary intention appear by the will.

(*m*) 22 & 23 Vict. c. 35.

(*n*) Sect. 16.

(*o*) See Wms. Real Prop. p. 253, 16th ed.

(*p*) *Ibid.*

(*q*) Mr. Joshua Williams and Lord St. Leonards; cf. Wms.

Real Assets, c. 6; Sugd. Pow. 120—122, 8th ed.

(*r*) Wms. Real Prop. p. 253, 16th ed.

(*s*) *Supra*, p. 144.

(*t*) *Roseingrave v. Burke*, 7 I. R. Eq. 190; Tudor's L. C. 309, 3rd ed.

“This rule is founded upon a *presumption* that it is the will of the testator that he who takes the land should take the crops which belong to it ; because every man’s donation shall be taken most strongly against himself” (*u*). But this presumption may be rebutted by words in the will which show a contrary intention, although they may not expressly refer to emblements (*x*).

Of course the heir will not be entitled to emblements in respect of land which has descended in consequence of a devise failing.

(*u*) 1 Wms. Exors. 720, 8th ed.

(*x*) See *West v. Moore*, 8 East, 339.



## CHAPTER VI.

THE SUCCESSION TO DECEASED EXECUTORS, ADMINISTRATORS,  
AND TRUSTEES WHO DIE TESTATE.I. *Where the Deceased was an Executor or Administrator.*

1. Where two or more persons are co-executors, or co-administrators, and one dies testate, the survivor or survivors will be entitled to carry on the whole administration, just as they would have been had the deceased died intestate (a).

2. Where a person is sole executor or sole administrator and dies testate, the law is as follows:—

(1) The executor of a deceased executor will succeed to the office of executor held by the deceased.

(2) The executor of a deceased administrator will *not* be entitled to succeed to the office of administrator, and an administrator *de bonis non administratis* must be appointed to carry on the administration.

The reason of this distinction is, that “the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; and so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator”(b). But an administrator is merely the officer of the Court by which he is appointed, and has no more power than any other official to transmit his office to another person by appointing him executor.

(a) *Supra*, p. 147.

(b) 1 Wms. Exors. p. 258,  
8th ed.

II. *Where the Deceased was a Trustee.*

What has already been said respecting the succession to deceased trustees who die intestate, applies equally to cases where they die testate—*devisee* being substituted for *heir*, and *executor* for *administrator*—except that, in cases to which the Conveyancing and Law of Property Act, 1881, does not apply (*i. e.*, in case of the death having occurred before 1st January, 1881), real property held in trust devolved upon the heir unless it had been *specially* devised to some other person.

## PART V.

## DONATIONES MORTIS CAUSÂ.



*Donationes mortis causâ* are derived from the civil law (a). They are gifts made at a time when the donor is in expectation of death, and are subject to an express or implied condition that the gift shall only become *absolute* in the event of his death actually taking place, and that in the meantime he shall be at liberty to revoke the gift. The state of mind of the donor is well expressed in Justinian's Institutes:—" *Et in summâ mortis causâ donatio est, cum magis se quis velit habere quam eum cui donat, magisque eum cui donat quam heredem suum*" (b). If the donor should recover from his illness, or if before his death he should revoke the gift, it becomes *void*.

In order to constitute a valid *donatio mortis causâ* the following conditions must be fulfilled (c):—

1. *The gift must be made in contemplation of death.*

A gift will, of course, be made in contemplation of death when the donor, at the time of making it, really expects that he is about to die; and where the donor is at the time "in his last sickness," or "languishing on his death bed," it seems that the gift will be presumed to be made in contemplation of death.

(a) *Ward v. Turner*, 2 Ves. 431; *Turner*, L. C. Equity, pp. 1003 et seq., 5th ed., from which the following conditions are summarized.

(b) Lib. II. tit. VII. 1.

(c) See the notes to *Ward v.*

2. *The gift must be intended to take effect only in the event of the donor's death.*

It is not, however, necessary that at the time of making the gift there should be an express declaration of intention by the donor; for if the gift be made in the extremity of sickness, or in contemplation of death, the law *implies a condition* that the gift was to take effect only in the event of the donor's death—unless the circumstances of the transaction show that the donor intended to make an immediate and irrevocable gift.

3. *There must be a delivery of the possession of the subject-matter of the gift to the donee* (either for his own use, or upon trust for another person, or for some particular object), *with the intention of parting with all rights of ownership over the same.*

Thus, in *Hawkins v. Blewitt (d)*, a person in his last illness ordered a box containing money and wearing apparel to be carried to the house of his aunt, and to be delivered to her. The next day the key was brought to him, and he desired it to be taken back, saying that he should want some articles of clothing out of the box. The Court held that this did not constitute a valid *donatio mortis causâ*. Lord Kenyon, C. J., said—"In the case of a *donatio mortis causâ* possession must be immediately given; that has been done here; a delivery has taken place: but *it is also necessary that by parting with the possession, the deceased should also part with the dominion over it*; that has not been done here. The bringing back the key by her, the next morning, to the intestate, and his declaration that he should want one of the articles of his apparel contained in it, are sufficient to show that he had no intention of making any gift or disposition of the box. It seems rather to have been left in the defendant's [*i.e.*, the aunt's] care for safe custody, and was so considered by herself."

Again, in *Bunn v. Markham* (e), a person, supposing himself to be *in extremis*, caused Indian bonds, bank notes, and guineas to be brought out of his iron chest, and laid on his bed; he then had them sealed up in three parcels with the amount and contents written on them, and also the words "for Mrs. and Miss C.;" they were then, by his direction, replaced in the chest and locked up, and the keys were sealed up and directed "to be delivered to J." (his solicitor) and one of his executors after his decease, and replaced in his own custody near his bed. He afterwards spoke of this property as given to Mrs. and Miss C. It was held not to be a valid *donatio mortis causa* (1) for want of sufficient delivery, and (2) on account of the donor remaining in possession.

The subject-matter of the gift cannot be delivered, so as to be a valid *donatio mortis causa*, by the delivery of anything *by way of symbol*;—e.g., the delivery of receipts for the purchase-money of South Sea annuities (f), and scrip-certificates of railway stock (g). Delivery of mere symbols of property must, however, be carefully distinguished from the delivery of the key of a place where property has been locked up: in this case the delivery of the key has been allowed as delivery of the possession of the property "*because it is the way of coming at the possession, or to make use of the thing; and therefore the key is not a symbol, which would not do*" (h). Thus, in *Jones v. Selby* (i), it was held that the delivery of the key of a trunk, with words of gift of the trunk and its contents, was a good delivery of a tally upon government for 500*l.* contained in the trunk. And it seems that the delivery of any document which would entitle the

(e) 7 Taunt. 224.

(g) *Moore v. Moore*, L. R. 18(f) *Ward v. Turner*, L. C. Eq. 474.

Equity, p. 999.

(h) *Ward v. Turner*, *supra*.

(i) Prec. Ch. 300.

donee to demand payment of money (*e.g.*, bank-notes, and notes and bills payable to bearer), or the possession of which by the donee would prevent the representatives of the deceased donor from enforcing payment of money due to the deceased (*e.g.*, the mortgage deeds of real estate), will constitute valid *donationes mortis causâ* (*j*).

4. *The intention to create a donatio mortis causâ must be proved by clear and satisfactory evidence.*

“The civil law required five witnesses to establish such a gift; a will requires two with us. It is difficult to suppose that it was not by an oversight that the legislature made no provision respecting gifts of this sort; but though our law does not define the number of witnesses required, it is laid down in all the cases where judges have commented on the evidence necessary to support a *donatio mortis causâ*, that it must be established by clear evidence. The proof must be more than is required merely to turn the scale in favour of one of two equally probable conclusions. It must establish to the satisfaction of the Court that the claimant’s case is not only probable, but reasonably free from doubt” (*k*). There is no absolute rule that the evidence of the claimant alone may not be sufficient, but “there is, of course, all the suspicion always attaching to an interested witness as regards candour and truthfulness” (*k*).

We will now summarize the points of resemblance and difference between *donationes mortis causâ* and legacies.

#### 1. Points of resemblance.

A *donatio mortis causâ*, like a legacy,—

(1) Is incomplete during the life of the donor, and may be revoked at any time before his death.

(*j*.) See the cases cited L. C. Equity, pp. 1008—1010.

(*k*) *M’Gonnell v. Murray*, I. R. 3 Eq. 465.

(2) Is liable to be taken by the creditors for the payment of debts in case the other assets are insufficient.

(3) Is subject to legacy duty, and is included in the valuation of the personal estate upon which the duty payable on applications for probate and letters of administration is assessed (1).

## 2. Points of difference.

A *donatio mortis causa*, unlike a legacy,—

(1) Must be in the possession of the donee during the lifetime of the donor.

(2) It cannot be revoked by *will*, for a will is inoperative until the death of the testator, and so at the same instant that the will takes effect the gift becomes absolute (m); but it seems that the gift may be satisfied by a legacy (m).

(3) It is quite independent of the will of the donor, and so does not require probate.

(4) If its subject-matter be such that the property in it passes by delivery (*e.g.*, a piece of plate), it becomes the absolute property of the donee the instant the donor dies; if the property in it does not pass by delivery (*e.g.*, a bond) the donee can compel the representatives of the donor to do what may be necessary to give effect to the gift. Thus, in the case of a bond, only the personal representatives of the donor can sue upon the bond, for, being a contract under seal, it is clear that no other person can acquire rights under it by merely having the document handed to him; but the personal representatives must allow the donee to sue on the bond in their names, upon being indemnified by him in respect of any liability which they may thereby incur (n).

(1) 36 Geo. III. c. 52, s. 7; 8 & 9 Vict. c. 76, s. 4. Probate, &c., duty, 44 Vict. c. 12, s. 38.

(m) *Jones v. Selby*, Prec. Ch. 300.

(n) *Gardner v. Parker*, 3 Madd. 184.

*Donationes mortis causâ* were not affected by the Wills Act (o); any doubt which there might have been on the subject was removed by 8 & 9 Vict. c. 76, s. 4, which expressly recognised them by making them subject to legacy duty. They have again been recognised by 44 Vict. c. 12, s. 38, which, as we have seen, made them subject to duty on probate and letters of administration.

(o) 7 Will. IV. & 1 Vict. c. 26.



# APPENDIX.

## THE DUTIES PAYABLE IN RESPECT OF TESTAMENTARY AND INTESTATE SUCCESSION.

### I. *Succession Duty.*

“SUCCESSION duty” is the name given to a duty payable by all persons who become entitled to *real* property or *leasehold* property by testamentary or intestate succession. The duty is imposed by the statute 16 & 17 Vict. c. 51, passed on the 4th of August, 1853, but which is to be taken to have commenced on the 19th of May in that year (*a*).

The value of the interest in real or leasehold property to which any person may be entitled by will or intestacy is to be ascertained in the manner provided by the Act (*b*), and the duty consists of a percentage on the value of such interest, varying in amount, according to the degree of relationship between the heir, or devisee, or (as to leaseholds) legatee and the deceased, in the following manner:—

1. All lineal descendants and ancestors pay *one* per cent.
2. Brothers or sisters, or their descendants, pay *three* per cent.
3. Paternal or maternal uncles or aunts, or their descendants, pay *five* per cent.
4. Paternal or maternal great-uncles or great-aunts, or their descendants, pay *six* per cent.
5. Persons in any other degree of collateral consanguinity pay *ten* per cent.
6. All strangers in blood to the deceased pay *ten* per cent. (*c*).

But in case the person entitled be married to a person in a nearer degree of consanguinity to the deceased, he, or she, is only liable to pay the same duty as would have been payable by the person to whom he, or she, is married had such person been entitled (*d*).

In case the money value of the whole property of the deceased does not exceed 100*l.*, no succession duty is payable (*e*).

As to certain cases where leaseholds are exempt from succession duty, see *post*, p. 265.

- (*a*) Sect. 54.  
(*b*) Sect. 21.  
(*c*) Sect. 10.

- (*d*) Sect. 11.  
(*e*) Sect. 21.

Succession duty is a first charge upon the interest in respect of which it is payable, and the Act provides that it shall be paid "by *eight* equal half-yearly instalments, the first to be paid at the end of twelve months after the successor shall have become entitled to the beneficial enjoyment of the property; and the *seven* following instalments are to be paid at half-yearly intervals of six months each, to be computed from the day on which the first instalment shall have become due. But if the successor shall die before all such instalments shall have become due, then any instalments not due at his death shall cease to be payable; except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property, in which case the instalments unpaid shall be a continuing charge on such interest in exoneration of his other property, and shall be payable by the owner for the time being of such interest" (*f*).

## II. *Duty on applying for Probate or Letters of Administration.*

The person applying for probate of a will or letters of administration to the estate of an intestate must pay a duty varying according to the value of the personal estate (*g*). For the purpose of ascertaining the amount of duty in any particular case it will be convenient to divide estates into the two following classes:—

1. Estates *exceeding the value of 300*l.** after deducting *reasonable* funeral expenses and all debts, except voluntary debts and debts primarily payable out of real estate. But these deductions are only allowed where the deceased was domiciled in the United Kingdom (*h*).

2. Estates *not exceeding the value of 300*l.** without deducting funeral expenses or debts.

### 1. Estates exceeding the value of 300*l.* (*i*).

Value of Estate.	Duty.
(1) Not exceeding 500 <i>l.</i> . . . . .	1 <i>l.</i> for every full sum of 50 <i>l.</i> , and for any fractional part of 50 <i>l.</i>
(2) Not exceeding 1,000 <i>l.</i> . . . . .	1 <i>l.</i> 5 <i>s.</i> 0 <i>d.</i> for every full sum of 50 <i>l.</i> , and for any fractional part of 50 <i>l.</i>
(3) Above the value of 1,000 <i>l.</i> . . . .	3 <i>l.</i> for every full sum of 100 <i>l.</i> , and for any fractional part of 100 <i>l.</i>

(*f*) Sect. 21.

(*h*) Sect. 28.

(*g*) These duties are now regulated by 44 Vict. c. 12.

(*i*) Sect. 32.

2. Estates not exceeding 300*l.* (*k*).

Value of Estate.	Duty.
(1) Not exceeding 100 <i>l.</i> ....	No duty, but the sum of 15 <i>s.</i> for fees of Court and expenses.
(2) Exceeding 100 <i>l.</i> .....	A fixed duty of 1 <i>l.</i> 10 <i>s.</i> 0 <i>d.</i> , and 15 <i>s.</i> for fees of Court and expenses.

No duty is payable where the deceased was a common seaman, marine, or soldier, and was slain or died in the service of the Crown (*l*).

III. *Legacy Duty.*

"Legacy duty" is the name given to a duty payable not only in respect of legacies, but also in respect of the share of residue to which any person may become entitled under the Statutes of Distribution(*m*), and of *donationes mortis causá*(*n*).

The duty consists of a percentage on the value of the legacy, or share of residue, or *donatio mortis causá*, varying in amount, according to the degree of relationship between the legatee or next of kin and the deceased, *exactly in the same manner as succession duty*; and the fact of the person entitled being married to a person in a nearer degree of relationship to the deceased has precisely the same effect.

Leasehold property is exempt from legacy duty (*o*), being subject, as we have seen, to succession duty.

It is provided that where the duty on applications for probate or letters of administration has been duly paid, legacy duty at *one per cent.*, and succession duty at *one per cent.* on leaseholds, shall not be payable(*p*). The effect of this provision is that ancestors and descendants of deceased persons are practically exempted from the payment of legacy duty.

No legacy duty is payable in respect of a legacy, or share of residue, to which the husband or wife of the deceased is entitled (*q*).

No legacy duty or (in the case of leasehold property) succession duty is payable where the value of the estate is less than 300*l.*, and the fixed duty of 30*s.* has been paid on application for probate or letters of administration (*r*).

No legacy duty is payable where the whole personal estate does not exceed the value of 100*l.*(*s*).

(*k*) Sect. 33.(*l*) 55 Geo. III. c. 184.(*m*) 55 Geo. III. c. 184.(*n*) 8 & 9 Vict. c. 76, s. 4.(*o*) 16 & 17 Vict. c. 51, s. 19.(*p*) 44 Vict. c. 12, s. 41.(*q*) 55 Geo. III. c. 184.(*r*) 44 Vict. c. 12, s. 36.(*s*) 43 Vict. c. 14, s. 13.



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